TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1908.

No. [redacted] 208

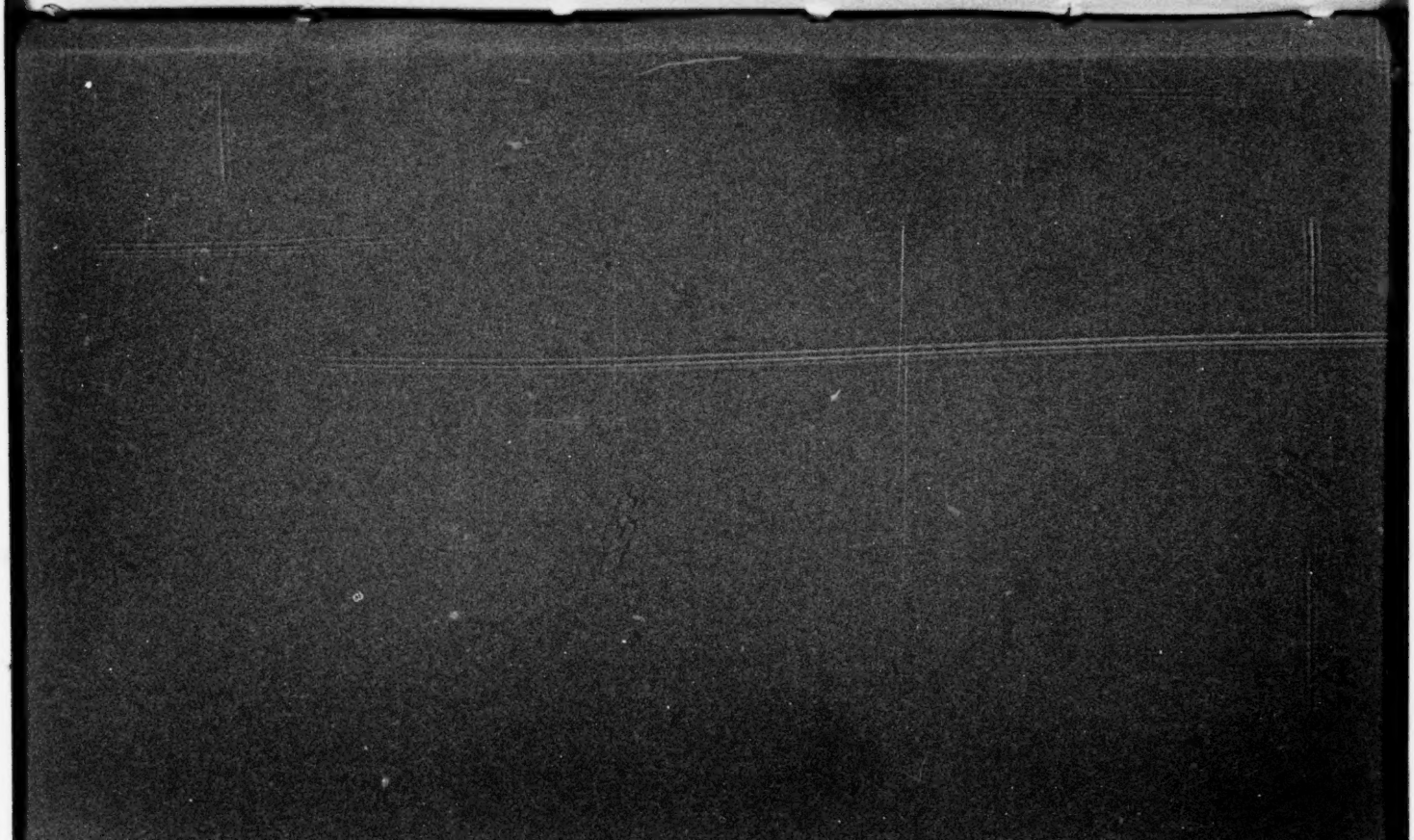
UNITED COPPER SECURITIES COMPANY AND ARTHUR P. HEINZE, PLAINTIFFS IN ERROR,

vs.

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED [redacted], 1908.



(24,862)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 579.

UNITED COPPER SECURITIES COMPANY AND ARTHUR P. HEINZE, PLAINTIFFS IN ERROR,

vs.

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 28, 1915.

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Writ of Error.

1

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs,

against

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and PHILIP S. HENRY, as Executors and Trustees of the Last Will and Testament of LEONARD LEWISOHN, deceased; RED METALS COMPANY; WILLIAM ROCKEFELLER, JOHN W. STERLING, FARMERS LOAN & TRUST COMPANY and HENRY H. ROGERS, as Executors and Trustees of the Last Will and Testament of HENRY H. ROGERS, deceased; JOHN D. RYAN, JAMES STILLMAN and UNITED COPPER COMPANY,
Defendants.

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} Writ of Error.

3

United States of America, }
Second Judicial Circuit, } ss.:

The President of the United States to the Honorable Judges of the District Court of the United States, for the Southern District of New York,

Writ of Error.

GREETING:

Because in the record and proceedings, as also in the making of the order dated the 31st day of August, 1914, that the demurrers to the complaint in the action which is in the said District Court, before you, or some of you, between plaintiffs and defendants be sustained and that the said complaint be dismissed, as also in the entering of the judgment dated the 24th day of September, 1914, dismissing the complaint a manifest error hath appeared, to the great damage of the said plaintiffs, we being willing that such error, if any hath been done, should duly be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals, for the Second Circuit, together with this writ, so that you have the same at the said place on the 2nd day of November, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid upon the said order being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS, the Hon. Charles M. Hough, Judge of the said United States District Court, this 5th day of October, 1914, and in the 139th year of the independence of the United States of America.

ALEX GILCHRIST, JR.,
Clerk of the District Court
of the United States for the
Southern District of New York
in the Second Circuit.

Endorsed. Filed. Oct. 5, 1914.

Praecipe.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs,

against

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and PHILIP S. HENRY, as Executors and Trustees of the Last Will and Testament of LEONARD LEWISOHN, deceased; WILLIAM ROCKEFELLER, JOHN W. STERLING, FARMERS LOAN and TRUST COMPANY and HENRY H. ROGERS, as Executors and Trustees of the Last Will and Testament of HENRY H. ROGERS, deceased; JOHN D. RYAN, JAMES STILLMAN, UNITED COPPER COMPANY,
Defendants.

The Clerk is requested to issue summons against above named defendants.

The residence of plaintiff is South Dakota.

Plaintiff is incorporated under the Laws of the State of South Dakota, and the location of its

10 principal office is 42 Broadway, Borough of Manhattan, New York City.

The office address of plaintiffs' attorney of record is 34 Nassau Street, Borough of Manhattan, New York City, and all papers in this cause may be served upon Ferdinand E. M. Bullowa, at No. 34 Nassau Street, Borough of Manhattan, City of New York.

FERDINAND E. M. BULLOWA,
Attorney for Plaintiffs.

Endorsed. Filed. May 3, 1912.

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Summons.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs,

against

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and PHILIP S. HENRY, as Executors and Trustees of the Last Will and Testament of LEONARD LEWISOHN, deceased; WILLIAM ROCKEFELLER, JOHN W. STERLING, FARMERS LOAN and TRUST COMPANY and HENRY H. ROGERS, as Executors and Trustees of the Last Will and Testament of HENRY H. ROGERS, deceased; JOHN D. RYAN, JAMES STILLMAN, UNITED COPPER COMPANY,
Defendants.

Summons at Law.

To the above named Defendants:

YOU ARE HEREBY SUMMONED to answer to the complaint in this action, and to serve a copy of your answer on the Plaintiffs' Attorney

within twenty days after the service of this Summons, exclusive of the day of service; and in case of your failure to appear, or answer, Judgment will be taken against you by default, for the relief demanded in the complaint.

WITNESS, the Hon. George C. Holt, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 3rd day of May, in the year one thousand nine hundred and twelve.

THOS. ALEXANDER,
(Seal) Clerk.

FERDINAND E. M. BULLOWA,
Plaintiffs' Attorney,
Office and Post Office Address,
34 Nassau Street,
Borough of Manhattan,
New York City.

Second Amended Complaint.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs,

against

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and PHILIP S. HENRY, as Executors and Trustees of the Last Will and Testament of LEONARD LEWISOHN, deceased; WILLIAM ROCKEFELLER, JOHN W. STERLING, FARMERS LOAN & TRUST COMPANY and HENRY H. ROGERS, as Executors and Trustees of the Last Will and Testament of HENRY H. ROGERS, deceased; JOHN D. RYAN, JAMES STILLMAN, UNITED COPPER COMPANY,
Defendants.

The plaintiffs above named by Ferdinand E. M. Bullowa, their attorney, complaining of the defendants above named, by this their amended complaint served pursuant to the directions of the court contained in the orders entered herein on the 14th

22 *Second Amended Complaint.*

day of February, 1914, and the 18th day of May, 1914, upon information and belief, allege:

I. The defendant, United Copper Company, at all the times hereinafter mentioned, was and now is a corporation duly organized and existing under the laws of the State of New Jersey and is a citizen of the State of New Jersey.

II. At all the times hereinafter mentioned, the defendant, United Copper Company, had and now has an outstanding common capital stock of Forty-
23 five million Dollars and an outstanding preferred capital stock of Five million Dollars.

III. The plaintiff, Arthur P. Heinze, now is and since in or about the month of May, 1902, has been the lawful holder of upwards of One hundred (100) shares of the common capital stock of said defendant, United Copper Company, of the par value of one hundred ($100) dollars each, which said shares of stock during the whole of said period have stood and now stand in the name of said plaintiff upon the stock books of said corporation defendant. The plaintiff, United Cop-
24 per Securities Company, now is, and since in or about the month of January, 1912, has been the lawful owner of upwards of one hundred (100) shares of the common capital stock of said defendant, United Copper Company, of the par value of one hundred ($100) dollars each.

IV. In or about the month of January, 1912, and before the commencement of this action the plaintiffs, United Copper Securities Company and Arthur P. Heinze, each made a demand upon the defendant, United Copper Company, that this or a like action be instituted by said corporation de-

fendant, and said corporation defendant, and its Board of Directors, have refused to comply with said demand, and have failed and refused to commence or cause to be commenced any action whatever in compliance therewith.

V. This action is commenced and prosecuted by the plaintiff United Copper Securities Company, and by the plaintiff, Arthur P. Heinze, each individually and for himself and also on his own behalf and on behalf of all the other stockholders of said United Copper Company.

VI. The plaintiff Arthur P. Heinze, is a citizen of the United States and of the State of New York.

VII. The plaintiff United Copper Securities Company is a corporation duly organized and existing under and by virtue of the laws of the State of South Dakota, and is a citizen of the United States and of the State of South Dakota.

VIII. The defendants, Amalgamated Copper Company, and Anaconda Copper Company, are corporations organized and existing under and by virtue of the laws of the State of New Jersey, and are citizens of the United States and of the State of New Jersey.

IX. The defendants Frederick Lewisohn, Walter Lewisohn and Philip S. Henry, are executors and trustees of the last will and testament of Leonard Lewisohn, deceased, and are citizens of the United States, and of the State of New York. The said Leonard Lewisohn died on or about the 5th day of March, 1902.

X. The Farmers Loan & Trust Company is a corporation duly organized and existing under

and by virtue of the laws of the State of New York, and it and the defendants, John W. Sterling and Henry H. Rogers, are executors and trustees of the last will and testament of Henry H. Rogers, deceased, and are citizens of the United States and of the State of New York. The said Henry H. Rogers died on or about the 19th day of May, 1909.

XI. All of the defendants above named are found within the Southern District of New York.

29 XII. For a number of years prior to the wrongful accomplishment of the conspiracies hereinafter set forth, and from in or about the year 1892, copper was a product of the mines of the State of Montana extensively mined and dealt in as interstate commerce by the defendant Anaconda Copper Mining Company and its predecessors, and various corporations organized and controlled by the testators of the defendants executors above-named during their lifetime and the individual defendants above-named, in competition with other corporations organized and financed by Arthur P. Heinze and F. Augustus
30 Heinze, said product of the mines of the State of Montana mined and dealt in as aforesaid, was shipped out of the State of Montaina by all of said corporations in competition, to the different states of the United States and to foreign countries in the form of pig copper, and in the form of electrolitically refined copper, and such shipments constituted interstate commerce in copper. The wrongful conspiracies herein referred to were in part accomplished in and during the year 1906, and in part in and during the year 1907, and in

part in and during the year 1908, and in part in and during the year 1911, and in part up to the time of the making of the demand set forth in paragraph "IV" hereof.

XIII. Since in or about the year 1892, and prior to the incorporation of the defendant, Amalgamated Copper Company, on or about the 27th day of April, 1899, among the copper mining and trading corporations aforesaid, there were in existence, and engaged in the mining and shipping of copper as interstate commerce, as aforesaid, the Boston and Montana Consolidated Copper and Silver Mining Company, the Butte & Boston Consolidated Mining Company, the Parrot Copper & Silver Mining Company, the Colorado Smelting and Refining Company, in addition to the Anaconda Copper Mining Company aforesaid, organized and controlled by the individual defendants and the testators of the defendants executors, aforesaid, the Nipper Consolidated Copper Mining Company, the Corra Rock Island Mining Company, the Minnie Healy Mining Company, the Belmont Mining Company, and the Montana Ore Purchasing Company, organized and financed by the Heinzes, aforesaid, and the Butte Reduction Works. Said Companies were actually engaged in competing to obtain the best results for the development of the copper industry, and to enlarge and extend their business in competition, and had established successful and profitable expanding businesses, and shipped the products of their mines as interstate commerce, and so distributed the same to the divers states of the United States and to foreign countries.

XIV. In or about the year 1897 Adolph Lewisohn, and Leonard Lewisohn, deceased, and other

34 persons, associated with them, controlled as stockholders, officers, directors and agents, the said Boston & Montana Consolidated Copper & Silver Mining Company, and the said Butte & Boston Consolidated Mining Company, and conceived that a monopoly in the aforesaid interstate commerce in copper would yield large profits, and thereupon wrongfully and maliciously entered into a combination and conspiracy to bring it about by unfair and unlawful means, among which are those hereinafter more particularly set forth.

35 XV. Thereafter and prior to the 27th day of April, 1899, the defendants, Anaconda Copper Mining Company, William Rockefeller, and James Stillman, and Henry H. Rogers, deceased, and one Marcus Daly, deceased, and others, wrongfully and maliciously joined said combination and conspiracy for the unlawful purpose aforesaid. Pursuant to said unlawful combination and conspiracy, for the unlawful purpose aforesaid, on or about the 27th day of April, 1899, the said testators of the defendants executors above-named, and the aforesaid individual defendants herein and others, unlawfully caused and procured the

36 defendant Amalgamated Copper Company, to be incorporated, and conspiring and combining with the controlling stockholders of the Anaconda Copper Mining Company, the Parrot Copper & Silver Mining Company, and the stockholders of the Colorado Smelting & Refining Company, and with the owners of very large blocks of stock of the Boston & Montana Consolidated Copper & Silver Mining Company and the Butte & Boston Consolidated Mining Company, and with said Marcus Daly, deceased, set about to form a copper trust,

and to exclude all participation in interstate trade and commerce in copper, which theretofore existed, as aforesaid, and which said conspirators feared would otherwise continue. In said attempt, and for the purpose of carrying out the same, and the said unlawful combination and conspiracy, in undue and unlawful restraint of interstate trade and commerce in copper, said defendants, testators and others unlawfully acquired the majority of the stock of the Anaconda Copper Mining Company, and the Parrot Copper & Silver Mining Company, and all of the stock of 38
the Colorado Smelting & Refining Company, and thereafter almost all of the remaining outstanding stock not then controlled by said conspirators, of the Boston and Montana Copper & Silver Mining Company, and the Butte & Boston Consolidated Mining Company, and thereafter unlawfully caused the defendant Amalgamated Copper Company to acquire the same. After the acquisition of the control of said Companies by the Amalgamated Copper Company, as aforesaid, the said Amalgamated Copper Company, and the testators of the defendants executors above-named, during 39
their lifetime, and the said individual defendants herein, and the defendant, John D. Ryan, operated and controlled all the affairs of said companies in unlawful combination and conspiracy and in undue and unreasonable restraint of interstate commerce in copper, and the said Amalgamated Copper Company became and has continued to be and now is, with its added interests a combination in undue and unreasonable restraint of interstate trade and commerce in copper.

XVI. At all times since the conception of the monopoly of interstate commerce in copper, as

aforesaid, and the wrongful and malicious endeavor to bring it about, the testators of the defendants executors above named during their lifetime, and the individual defendants above named and the defendant Anaconda Copper Mining Company and the defendant Amalgamated Copper Company after its incorporation as aforesaid, continued said unlawful conspiracy and combination in the attempt and for the purpose of accomplishing the undue and unreasonable restraint of interstate trade and commerce in copper, and of destroying the competition theretofore existing therein, and for such purpose, did, in combination and conspiracy, a great number of wrongful, malicious and unlawful acts, and used a great number of wrongful, malicious and unlawful means.

XVII. On the 28th day of April, 1902, the defendant United Copper Company was incorporated, and duly acquired the stock of the Montana Ore Purchasing Company and the other copper mining and trading companies which the said Heinzes had organized and financed, as aforesaid, and, through its said stock ownership, endeavored to continue the business of said Montana Ore Purchasing Company and said other mining and trading companies, and through said operating companies to compete with the corporations controlled by said Rogers, and the individual defendants, as aforesaid, in dealing in copper in interstate commerce.

XVIII. After the incorporation of the said defendant United Copper Company, the unfair, unlawful, improper, wrongful and malicious acts and practices aforesaid of said Rogers, and said

defendants in conspiracy and combination were continued, and directed against the United Copper Company and against the other Companies organized and financed by said Heinzes, and acquired by the United Copper Company as aforesaid, and their stockholders and officers and said Heinzes.

XIX. Among the wrongful, unlawful and malicious acts done, in combination and conspiracy, for the purposes aforesaid, said conspirators did prior to the 1st day of July, 1906, wrongfully and 44
maliciously institute and cause to be instituted and prosecuted, numerous wrongful and malicious suits, actions and legal proceedings against the mining and trading companies organized and financed by said Heinzes and acquired by said defendant United Copper Company as aforesaid, and against the United Copper Company after its incorporation as aforesaid. In said suits and actions, numerous sums of money were wrongfully and maliciously claimed and demanded for alleged damages, far in excess of any possible value of ore unlawfully and maliciously claimed by the plaintiffs in said actions to have been wrongfully 45
extracted and mined from properties wrongfully and maliciously claimed by the plaintiffs in said actions as their property, and which said properties were in reality rightfully claimed and owned by the defendants in said actions, and from which the said ores were rightfully and without trespass, mined by the defendants in said suits. In said suits and actions, applications were wrongfully and maliciously made for injunctions to restrain the defendants therein from mining such properties, on the pretended and malicious

46 claims of the plaintiffs therein, that the veins situated in the properties, the operation of which was sought to be restrained, belonged to the plaintiffs in said suits and actions, and injunctions restraining the operation of said properties on behalf of the plaintiffs in said suits and actions, were maliciously and unlawfully secured. Upon the acquisition of new properties by the United Copper Company after its incorporation as aforesaid, or by the companies organized and financed by said Heinzes and acquired by the
47 United Copper Company, as aforesaid, similar suits and actions were similarly brought and prosecuted. Said suits and actions were repeatedly so wrongfully and maliciously brought and prosecuted at such times and in such manner as was calculated to do most injury, after large sums of money had been spent upon the development of the properties of the said companies organized and financed by said Heinzes, as aforesaid, so as to make them profitable by the extraction of ore therefrom. The individual defendants and the testators of the defendants executors, in combination, and conspiracy as aforesaid did, among
48 others, on or about the 28th day of February, 1899, wrongfully, maliciously, and in bad faith, and without hope or expectation of being successful, institute and cause to be instituted an action in the courts of the State of Montana, entitled "Boston & Montana Consolidated Copper & Silver Mining Company against Montana Ore Purchasing Company," and did prosecute and cause the same to be prosecuted, although said action was wholly without merits, and well known to said defendants and testators to be without merits, solely in order to unduly and unreasonably restrain the

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interstate commerce in copper, and in order to crush the competition then being engaged in with them by the Montana Ore Purchasing Company, and the said companies organized and financed by said Heinzes. In said action, said defendants and said testators did, for the purposes aforesaid, cause to be applied for and secured orders of the Court requiring the filing of bonds by the said Montana Ore Purchasing Company, in colossal sums, under penalty of being enjoined from mining the western portion of the Rarus mine, in which said defendants and said testators had no 50
interest whatsoever, and which was the property of the said Montana Ore Purchasing Company prior to the incorporation of the defendant United Copper Company, and thereafter, through its stock ownership of the Montana Ore Purchasing Company of the United Copper Company. Such applications for increased bonds were repeated and continued in bad faith and solely for the purposes aforesaid, the said defendants and testators relying upon the fact that the Supreme Court of the State of Montana was overburdened with causes on its docket awaiting argument, and would not be able to hear said 51
cause upon its merits for a long period of time. Such applications were continued as aforesaid for several years, and increased bonds, in the aggregate approximating $3,000,000, required to be filed, before the cause was reached by the Supreme Court of the State of Montana, when the appeal was instantly dismissed upon its merits, and all of said bonds vacated.

XX. Among the other unlawful acts and practices done, for the aforesaid unlawful purposes

52 and to exclude the United Copper Company from engaging, through the mining and trading companies acquired by it as aforesaid in the interstate trade and commerce in copper, aforesaid, the said Rogers and the said defendants also did unlawfully and maliciously attack the credit and standing throughout the financial world of the said United Copper Company and the said companies acquired by it as aforesaid, and their stockholders and officers, and the said Heinzes who had organized and financed them, as aforesaid, and
53 who together with the firm of Otto Heinze and Company were continuing to finance them, and did unlawfully and maliciously strive to discredit the United Copper Company and said Companies acquired by it as aforesaid, and their stockholders and officers and the said Heinzes who were financing them as aforesaid, and did cause the erroneous public impression that the properties of the United Copper Company and said companies acquired by it as aforesaid, were utterly worthless. Said Rogers and said defendants did thereby wrongfully and maliciously attempt to and did unduly and unreasonably restrain interstate com-
54 merce in copper, and did thereby attempt to and and did impair the ability of the United Copper Company and said Companies acquired by it as aforesaid, to freely compete with the defendants Amalgamated Copper Company and Anaconda Copper Mining Company and with the other companies controlled by said Rogers and said defendants, in the interstate commerce and trade in copper, and did thereupon wrongfully and maliciously attempt to and did impair the ability of the United Copper Company and the companies acquired by it as aforesaid, to acquire additional

mining properties in the Butte Mining District for development, and for the purpose of mining the same in order to produce copper as an object of interstate trade and commerce, and did thereby wrongfully and maliciously attempt to and did destroy the credit and standing of the United Copper Company and the companies organized and financed by said Heinzes and acquired by the United Copper Company, as aforesaid, and did thereby attempt to and did unduly and unreasonably restrain interstate commerce and trade in copper. Such attempts and such results were made and attained by a large number of wrongful, unlawful and malicious acts and practices resorted to by said Rogers and said defendants.

XXI. By reason of the aforesaid unfair, improper, wrongful, unlawful and malicious practices and methods of the said defendants and said Rogers, and their attempts to monopolize and restrain interstate commerce and trade in copper, and their unlawful conspiracies and combinations, the defendant United Copper Company was greatly damaged and injured, and the annual profits reduced annually from the time of its incorporation above set forth to the 1st day of July, 1906, to an extent of net less than $1,000,000 per year, and during all of said period, it was put to enormous unnecessary expenditures for the protection of the copper properties belonging to it and the companies organized and financed by said Heinzes and acquired by it, as aforesaid, both above ground and under ground.

XXII. From the time of the incorporation of the United Copper Company aforesaid, until on or about the 1st day of July, 1906, said Rogers

58 and the defendants other than the defendant United Copper Company and the defendants executors, circulated and caused to be circulated by their agents and representatives, the report that they would not desist in their warfare against the defendant United Copper Company, and the companies organized and financed by said Heinzes and acquired by the United Copper Company, as aforesaid, and the interests and properties of said companies until their utter destruction had been accomplished. Said Rogers and said defendants
59 did finally, by the aforesaid unlawful, wrongful and malicious means, unlawfully procure a sale to them or interests allied to them for their benefit, of the copper mines in the State of Montana belonging to the United Copper Company and said companies organized and financed by said Heinzes and acquired by the United Copper Company as hereinabove set forth, with the exception of the La France Copper Company, at a price far below the value thereof, and not in excess of 30 per cent. of said value. The said defendants and said Rogers did thereupon cause said properties, so acquired by them and in their inter-
60 ests, to be transferred to the Red Metals Company, and the Butte Coalition Company and all disputes between the defendant Amalgamated Copper Company and the companies controlled by it, and the companies which owned the United Copper Company properties transferred as aforesaid to the Red Metals Company and the Butte Coalition Company for said defendants and said Rogers, as aforesaid, were thereupon abandoned, and the said properties were thereupon developed by and on behalf of said Rogers and the defendants aforesaid according to their actual values, and such

properties were immediately properly valued at in excess of three times the amount paid therefor. The said defendants and said Rogers during his lifetime, thereafter still continued their unlawful conspiracy in undue and unlawful restrain of interstate commerce and trade in copper, and within the last year prior to the commencement of this action, the Anaconda Copper Mining Company has unlawfully become possessed in pursuance to said conspiracy, and in furtherance thereof, of all the mines formerly owned by the other companies controlled by the Amalgamated Copper Company, and of those of the United Copper Company and the companies organized and financed by said Heinzes and transferred to the Red Metals Company and the Butte Coalition Company, as herein above alleged, and has also in pursuance of said conspiracy, acquired the mining interests of W. A. Clark's Butte Reduction Works, the only other large competitor in the interstate commerce in copper in the State of Montana, leaving only a few small and insignificant companies mining or dealing in copper in the Butte Copper District in the State of Montana, not controlled by the defendants Amalgamated Copper Company and Anaconda Copper Mining Company, and none which were in existence at the inception of the conspiracy.

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XXIII. By reason of the aforesaid unlawful practices and attempts of said Rogers and said defendants to monopolize and restrain interstate commerce and trade in copper, the copper properties owned by the United Copper Company and in which it is and was interested, and its business in copper and copper properties was de-

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stroyed, and the said copper properties were greatly depreciated in value, by reason of the inability of the United Copper Company to work the same, and increase the output of copper ore and commercial copper in competition with the companies controlled by said Rogers and the defendants aforesaid, and the credit and financial standing of the United Copper Company was impaired and destroyed, and the operations of the mines owned and controlled by the United Copper Company and in which it was interested as hereinabove set
65 forth, were curtailed and abandoned, and the said defendants thereupon succeeded in their attempts to monopolize the entire interstate trade and commerce in copper which was a product of the mines of the State of Montana, and still control and monopolize the same, thereby preventing the operation of any competing mines and companies, to the great detriment of the United Copper Company and of the public, and contrary to the provisions of the statutes in such case made and provided.

XXIV. All of the aforesaid unlawful and wrongful acts and practices of the said defend-
66 ants and the testators of the defendants executors, during the lifetime of said testators, were done and performed with the intent and for the purposes of monopolizing the interstate commerce and trade in copper, which was a product of the mines of the State of Montana, and in order to render it difficult, unprofitable, and impossible for the United Copper Company to continue in competition as hereinabove set forth, with the defendant corporations other than the United Copper Company, and with the corporations controlled by the defendants other than the defend-

ants executors, as aforesaid, in the interstate commerce in copper aforesaid. All of said acts and practices were done and performed by said defendants and said testators, wantonly, wrongfully, maliciously and unlawfully, in pursuance of a conspiracy and combination with and among themselves and other persons, firms and corporations, and with the purpose and intent of unduly and unreasonably restraining said interstate trade and commerce in copper, and to monopolize said trade and commerce in copper among the several states of the United States against the provisions 68
of the statutes in such case made and provided. and more particularly against the provisions of the statutes of the 51st Congress of the United States passed and approved July 2, 1890, which statutes are known and designated as an Act of Congress July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies (26 Statutes 202)."

XXV. On or about the 1st day of July, 1906, said Rogers and the defendants aforesaid, had secured the substantial control and monopoly of the interstate and foreign trade and commerce in the copper products of the State of Montana, to 69
the parties to the said unlawful contracts, combinations and conspiracies as aforesaid, and had unduly and unreasonably restrained the competition which had theretofore existed between the aforesaid companies, as aforesaid, and had prevented the defendant United Copper Company and the companies organized and financed by the said Heinzes and acquired by the defendant United Copper Company as aforesaid, from continuing in competition as theretofore and had damaged and injured the United Copper Company in its

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business and in its property. Since said date said Rogers during his lifetime, and the said defendants maintained and increased the control and monopoly of said trade and commerce and continued to injure said United Copper Company as aforesaid.

XXVI. By reason of the premises, and the aforesaid unlawful combinations and conspiracy, and the acts of the aforesaid testators and of the defendants other than the defendant United Copper Company and the defendants executors, done in
71 pursuance thereof and to carry the same into effect, the United Copper Company has been damaged and injured in its business and property, and has sustained damages in excess of Five Million ($5,000,000) Dollars.

WHEREFORE, the plaintiffs demand judgment in their favor and in favor of any stockholders of the United Copper Company who may join with them in the prosecution of this action in the sum of three-fold damages under Section 7 of the Act of Congress aforesaid, and that each of the defendants shall be compelled to pay the
72 damages sustained by the United Copper Company, as hereinbefore alleged.

FERDINAND E. M. BULLOWA,
Attorney for the Plaintiffs,
Office and Post Office Address,
34 Nassau Street,
Borough of Manhattan, New York City.

State of New York, } ss.:
County of New York, }

ARTHUR P. HEINZE, being duly sworn, deposes and says: that he is one of the plaintiffs above named and that he is an officer and an agent of the plaintiff corporation above named; that he has read the foregoing amended complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true; that the reason why this verification is made by him and not by said plaintiff corporation is that said plaintiff corporation is a foreign corporation and that he is an officer and the agent thereof, and all the material allegations of said amended complaint are within his personal knowledge.

ARTHUR P. HEINZE.

Sworn to before me this
5th day of June, 1914.
LAWRENCE E. BROWN,
Commissioner of Deeds,
New York City.
Residing in the County of Kings,
New York County Register's No. 15050,
Kings County Register's No. 5052.
Endorsed. Filed, Sept. 23, 1914.

76 **Demurrer of Defendant Adolph Lewisohn.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE, against 77 AMALGAMATED COPPER COMPANY, and others.	Demurrer. (Stockholders' Suit.)

The defendant, Adolph Lewisohn, demurs to the second amended complaint herein, on the ground that, as appears upon the face thereof, the second amended complaint does not state facts sufficient to constitute a cause of action.

New York, June 20, 1914.

78 GUGGENHEIMER, UNTERMYER & MARSHALL,
Attorneys for Adolph Lewisohn,
Office and Post Office Address,
No. 37 Wall Street,
Borough of Manhattan,
New York City.

Endorsed. Filed. June 22, 1914.

Demurrer of Defendants Amalgamated Copper Co., et al. 79

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE, against AMALGAMATED COPPER COMPANY, and others.	Demurrer. (Stockholders' Suit.) 80

The defendants, Amalgamated Copper Company, Anaconda Copper Mining Company (sued as "Anaconda Copper Company"), John D. Ryan and John W. Sterling, Farmers' Loan & Trust Company and Henry H. Rogers, as Executors and Trustees of the Last Will and Testament of Henry H. Rogers, deceased, demur to the second amended complaint herein, on the ground that, as appears upon the face thereof, the said second amended complaint does not state facts sufficient to constitute a cause of action, and upon the further ground that the plaintiffs' remedy, if any, is in equity. 81

New York, June 20, 1914.

SHEARMAN & STERLING,
Attorneys for Amalgamated Copper Company and others,
55 Wall Street,
New York City.

Endorsed. Filed. June 24, 1914.

82 **Order Sustaining Demurrer.**

At a Stated Term of the United States District Court, Southern District of New York, held at the United States Court House and Post Office Building, Borough of Manhattan, New York City, August 31, 1914.

Present—Hon. E. Henry Lacombe,
Circuit Judge.

83 United Copper Securities Company and Arthur P. Heinze,

against

Amalgamated Copper Company, and others.

Order. (Stockholders' Suit.)

84 The defendants having moved to dismiss the second amended complaint herein and the defendants Amalgamated Copper Company, Anaconda Copper Mining Company (sued as "Anaconda Copper Company"), John D. Ryan, Adolph Lewisohn and John W. Sterling, The Farmers' Loan & Trust Company and Henry H. Rogers, as Executors and Trustees of the Last Will and Testament of Henry H. Rogers, deceased, having demurred to the said second amended complaint, on the ground that it does not state facts sufficient to constitute a cause of action, and the said motion having duly come on to be heard, and the issues of law arising upon the said demurrers having been duly brought on for trial and a motion duly made for judgment on the pleadings, all

before me at a stated term of this Court, on July 29, 1914; NOW, after hearing John A. Garver, of counsel for the defendants, in support of the said motions and demurrers, and Ferdinand E. M. Bullowa, of counsel for the plaintiffs, in opposition thereto, and it appearing that the facts averred in the said second amended complaint do not warrant the relief prayed for and that the demurrers thereto are well taken, it is 85

ORDERED, that the demurrers of the said defendants be sustained and that the second amended complaint herein be dismissed, with costs.

E. HENRY LACOMBE, 86

U. S. C. J.

Endorsed. Filed. Aug. 31, 1914.

87

88 **Judgment.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs,

against

89 AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and PHILIP S. HENRY, as Executors and Trustees of the Last Will and Testament of LEONARD LEWISOHN, deceased; WILLIAM ROCKEFELLER, JOHN W. STERLING, FARMERS LOAN and TRUST COMPANY and HENRY H. ROGERS, as Executors and Trustees of the Last Will and Testament
90 of HENRY H. ROGERS, deceased; JOHN D. RYAN, JAMES STILLMAN, UNITED COPPER COMPANY,
Defendants.

Final Judgment.

The defendants having moved to dismiss the second amended complaint herein and the defendants Amalgamated Copper Company, Anaconda Copper Mining Company (sued as "Anaconda Copper Company"), John D. Ryan, Adolph Lewisohn, and John W. Sterling, The Farmers' Loan & Trust

91

Company and Henry H. Rogers, as Executors and Trustees of the Last Will and Testament of Henry H. Rogers, deceased, having demurred to the said second amended complaint, on the ground that it does not state facts sufficient to constitute a cause of action, and the said motion having duly come on to be heard, and the issues of law arising upon the said demurrers having been duly brought on for trial and a motion duly made for judgment on the pleadings at a stated term of this Court, on July 29, 1914, and an order having been duly entered and filed herein on August 31, 1914, directing that the demurrers of the said defendants be sustained and that the second amended complaint herein be dismissed, with costs, and the defendants' costs having been adjusted at $48.15; it is

92

ADJUDGED:

I. That the demurrers of the said defendants to the second amended complaint herein be sustained.

II. That the said complaint be and it hereby is dismissed.

93

III. That the defendants, Amalgamated Copper Company, Anaconda Copper Mining Company, sued as "Anaconda Copper Company," John D. Ryan and John W. Sterling, The Farmers' Loan and Trust Company and Henry H. Rogers, Jr., as Executors and Trustees of the Last Will and Testament of Henry H. Rogers, deceased, recover from the plaintiffs the sum of $28.15, the costs of this action as taxed.

94 *Judgment.*

IV. That the defendant Adolph Lewisohn recover from the plaintiff the sum of $10.00, the costs of this action as taxed.

V. That the defendants Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors and Trustees of the Last Will and Testament of Leonard Lewisohn, deceased, recover from the plaintiffs the sum of $10.00, the costs of this action as taxed.

Judgment, September 24, 1914.

95

ALEX GILCHRIST, JR.,

Clerk.

Endorsed. Filed. Sept. 24, 1914.

96

Petition for Writ of Error. 97

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs,

against

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and PHILIP S. HENRY, as Executors and Trustees of the Last Will and Testament of LEONARD LEWISOHN, deceased; RED METALS COMPANY; WILLIAM ROCKEFELLER, JOHN W. STERLING, FARMERS LOAN & TRUST COMPANY and HENRY H. ROGERS, as Executors and Trustees of the Last Will and Testament of HENRY H. ROGERS, deceased; JOHN D. RYAN, JAMES STILLMAN and UNITED COPPER COMPANY,
Defendants. 98 99

Petition for Writ of Error.

And now come the United Copper Securities Company and Arthur P. Heinze, the plaintiffs herein, and say, that on or about the 31st day of August, 1914, this court made an order in favor of the defendants herein, and against the plain-

100 tiffs directing that the demurrers to the complaint be sustained and that the complaint be dismissed and on or about the 24th day of September, 1914, entered a judgment herein, dismissing the complaint, and in which order and judgment certain errors were committed, to the prejudice of the plaintiffs, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, these plaintiffs pray that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals, for the Second Circuit, for the correction of errors so complained
101 of, and that a transcript of the record proceedings and papers with respect to the said order duly authenticated may be sent to the said Circuit Court of Appeals.

Dated, New York, October 5th, 1914.

FERDINAND E. M. BULLOWA,
Attorney for Plaintiffs,
34 Nassau Street,
Borough of Manhattan, New York City.

Endorsed. Filed. Oct. 5, 1914.
102

Order Allowing Writ of Error. 103

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs,

against

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and PHILIP S. HENRY, as Executors and Trustees of the Last Will and Testament of LEONARD LEWISOHN, deceased; RED METALS COMPANY; WILLIAM ROCKEFELLER, JOHN W. STERLING, FARMERS LOAN & TRUST COMPANY and HENRY H. ROGERS, as Executors and Trustees of the Last Will and Testament of HENRY H. ROGERS, deceased; JOHN D. RYAN, JAMES STILLMAN and UNITED COPPER COMPANY,
Defendants. 104 105

Order Allowing Writ of Error.

This 5th day of October, 1914, came the plaintiffs, by their attorney, Ferdinand E. M. Bullowa, and filed herein and presented to the Court, their petition praying for the allowance of a writ of error upon an assignment of errors intended to

106 *Order Allowing Writ of Error.*

be urged by it, praying also that a transcript of the record and proceedings and papers upon which the order herein dated the 31st day of August, 1914, directing that the demurrers of the defendants be sustained and that the complaint be dismissed, and the judgment herein dated the 24th day of September, 1914, dismissing the complaint may be sent to the United States Circuit Court of Appeals for the Second Circuit, and that such other and further proceedings may be had as may be proper in the premises.

107 On consideration whereof the Court does allow the writ of error, and a supersedeas having been duly filed herein in the sum of $250, all further proceedings in this Court are suspended and stayed until the termination of said writ of error by the United States Circuit Court of Appeals for the said Circuit.

Dated, October 5th, 1914.

J. M. MAYER,
District Judge.

Endorsed, filed, Oct. 5, 1914.

108

Assignment of Errors. 109

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs,

against

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and PHILIP S. HENRY, as Executors and Trustees of the Last Will and Testament of LEONARD LEWISOHN, deceased; RED METALS COMPANY; WILLIAM ROCKEFELLER, JOHN W. STERLING, FARMERS LOAN & TRUST COMPANY and HENRY H. ROGERS, as Executors and Trustees of the Last Will and Testament of HENRY H. ROGERS, deceased; JOHN D. RYAN, JAMES STILLMAN and UNITED COPPER COMPANY,
Defendants.

110

Assignment of Errors.

111

Now come the said plaintiffs, United Copper Securities Company and Arthur P. Heinze, and in connection with their petition for a writ of error, herein, make the following assignment of errors in the judgment of the District Court of the United States for the Southern District of

112 *Assignment of Errors.*

New York, dated September 24th, 1914, and in the order of the said Court dated August 31st, 1914.

1. The said District Court erred in making the said order.

2. The said District Court erred in granting the motion of the defendant upon which said order was made.

3. The said District Court erred in sustaining
113 the demurrers to the complaint.

4. The said District Court erred in directing that the complaint herein be dismissed.

5. The said District Court erred in entering the judgment herein dismissing the complaint.

WHEREFORE, the said plaintiffs in error pray that the said judgment and the said order of the District Court may be reversed.

Dated, October 5th, 1914.

FERDINAND E. M. BULLOWA,
Attorney for Plaintiffs-in-Error,
114 No. 34 Nassau St.,
Borough of Manhattan, New York City.

Endorsed. Filed. Oct. 5, 1914.

Citation. 115

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs,

against

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and PHILIP S. HENRY, as Executors and Trustees of the Last Will and Testament of LEONARD LEWISOHN, deceased; RED METALS COMPANY; WILLIAM ROCKEFELLER, JOHN W. STERLING, FARMERS LOAN & TRUST COMPANY and HENRY H. ROGERS, as Executors and Trustees of the Last Will and Testament of HENRY H. ROGERS, deceased; JOHN D. RYAN, JAMES STILLMAN and UNITED COPPER COMPANY,
Defendants. 116 117

Citation.

United States of America, ss.:

To Amalgamated Copper Company, Anaconda Copper Company, Adolph Lewisohn, Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as Executors and

118 *Citation.*

Trustees of the Last Will and Testament of Leonard Lewisohn, deceased; Red Metals Company, William Rockefeller, John W. Sterling, Farmers Loan & Trust Company, and Henry H. Rogers, as Executors and Trustees of the Last Will and Testament of Henry H. Rogers, deceased; John D. Ryan, James Stillman, and United Copper Company; GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Ap-
119 peals for the Second Circuit to be holden at the City of New York in the State of New York, on November 2nd, 1914, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Southern District of New York wherein the United Copper Securities Company and Arthur P. Heinze are plaintiffs-in-error and you are defendants-in-error, to show cause if any there be, why the judgment and order in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Man-
120 hattan, City of New York, in the Southern District of New York, this 5th day of October, one thousand nine hundred and fourteen.

J. M. MAYER,
U. S. D. J.

Service of a copy of the foregoing citation this day admitted. 121

Dated, October 6th, 1914.

SHEARMAN & STERLING,
Attys. for defts. Amal. Copper Co., et al.
GUGGENHEIMER, UNTERMYER & MARSHALL,
Atts. for deft. Adolph Lewisohn.
HOADLY, LAUERBACH & JOHNSON,
Attys. for deft. estate of Leonard Lewisohn.
Endorsed. Filed. Oct. 15, 1914.

122

Opinion of Judge Lacombe.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs,

against

AMALGAMATED COPPER COMPANY, *et al.*,
Defendants.

123

"This suit is brought, under the Sherman Act, by stockholders of the United Copper Company on the ground that the Company, after a request by plaintiffs, refused to bring the action. It is contended by plaintiffs that the action is one at law, not in equity; on the basis of that contention it will be disposed of.

It seems to me quite clear that the facts averred in the complaint do not warrant the relief prayed for, and for that reason the demurrer is sustained.

124 If indeed the proposition seemed to me a doubtful one I should make a similar disposition of the case, for it would be lamentable to lose the time and money necessarily involved in a trial of the issues before a jury, with the chance that at the last it might be held on appeal that the relief prayed for could not be granted on the facts averred. The serious point of law involved should be first disposed of in court of last resort.

Demurrer sustained."

Stipulation.

125

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs,

against

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY,
126 ADOLPH LEWISOHN, FREDERICK LEWISOHN, WALTER LEWISOHN, ALBERT LEWISOHN and PHILIP S. HENRY, as Executors and Trustees of the Last Will and Testament of LEONARD LEWISOHN, deceased; *et al.*,
Defendants.

IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true transcript

of the record of the said District Court in the above entitled matter as agreed on by the parties. 127

Dated, October 19th, 1914.

FERDINAND E. M. BULLOWA,
Attorney for Plaintiffs.

SHEARMAN & STERLING,
Attorneys for defendants Amalgamated Copper Company, et al.

GUGGENHEIMER, UNTERMYER & MARSHALL,
Attorneys for defendant Adolph Lewisohn.

HOADLY, LAUTERBACH & JOHNSON,
Attorneys for defendant Estate of Leonard Lewisohn. 128

Clerk's Certificate.

United States of America, Southern District of New York, } ss.:

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs,

vs.

AMALGAMATED COPPER COMPANY, *et al.*,
Defendants. 129

I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court

130 in the above-entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District
(Seal) of New York, this day of October in the year of our Lord one thousand nine hundred and fourteen and of the Independence of the said United States the one hundred and thirty-ninth.

131

ALEXANDER GILCHRIST, JR.,
Clerk.

132

United States Circuit Court of Appeals for the Second Circuit, October Term, 1914.

Argued March 5, 1915. Decided April 13, 1915.

No. 219.

THE UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE, Plaintiffs-in-Error,
vs.
THE AMALGAMATED COPPER COMPANY et al., Defendants-in-Error.

In Error to the District Court of the United States for the Southern District of New York.

Before Coxe, Ward, and Rogers, Circuit Judges.

WARD, *Circuit Judge:*

This is an action at law by two stockholders of the United Copper Company on behalf of themselves and all other stockholders of that company averring that they had asked the defendant, the United Copper Company, to bring the suit and it had refused to do so, to recover treble damages under Sec. 7 of the Sherman Act of July 2, 1890, from certain of the individual and corporate defendants on the ground of conspiracy to create a monopoly in the interstate commerce and trade in copper produced in the State of Montana. The complaint alleges that certain of the defendants obtained the control of a large number of copper mines in that state, theretofore competing with each other and operated them as a trust by means of the defendant the Amalgamated Copper Company; that there were at the same time a number of other copper companies in Montana controlled by one F. A. Heinze and his brothers which in the year 1902 were put under the control of the defendant the United Copper Company, from and after which date the defendant the Amalgamated Copper Company and others of the defendants combined to destroy its business and so get absolute control of the interstate commerce and trade in the copper industry of Montana. By a series of illegal acts not necessary to specify, it was further alleged that the conspirators did procure the sale to them of all but one of the copper mines controlled by the defendant the United Copper Company at a price less than one-third of their value, leaving only a few insignificant independent companies mining and dealing in copper in Montana, and have destroyed the credit and standing of the United Copper Company and greatly reduced the profits of its business.

Demurrers were filed by the defendants on the ground that the complaint did not state facts sufficient to constitute a cause of action and that the plaintiffs' remedy, if any, was in equity. Judge Lacombe upon motion to dismiss the complaint on the pleadings under Sec. 547 of the Code of Civil Procedure of the State of New

York sustained the demurrers and dismissed the complaint, where upon the plaintiffs sued out this writ of error.

It is quite clear and indeed the plaintiffs concede it to be so, tha the cause of action set up belongs to the United Copper Company defendant. The cause of action is one conferred by Sec. 7 of th Sherman Act in tort for treble damages. We have held that it can not be maintained at all in equity, Fleitman v. United Gas Co., 21 Fed. Rep., 103. The sole question, therefore, is, can a stockholde maintain it in right of the corporation at law? The case of Metca v. American School Furniture Co., 108 Fed. Rep., 909, affirmed 11 Fed. Rep., 1020, greatly relied upon by the plaintiffs, does not appl because in it the complainant sought to recover treble damages fo herself individually, together with equitable relief for the corpor tion. The bill for that reason was dismissed as multifarious. must be admitted that in Sheridan v. Electric Light Co., 38 Hun 396, a stockholder sued at law upon a cause of action belonging the corporation which has refused to do so. Curiously enough Daniels, J. sustained the action on the ground that a stockholder ha such a right in equity:

"For where the officers of a corporation charged with that duty r fuse to prosecute an action in a proper case, or the corporation itse is under the control of the officers, whose misconduct is to be mad the subject of the action, the stockholders, 'have a standing in a cou of equity to sue in their own names, making the corporation a par defendant.' (Brinckerhoff v. Bostwick, 88 N. Y., 52, 56; Young Drake, 8 Hun, 61; Hawes v. Oakland, 104 U. S., 450.)"

We are not persuaded by Morrill v. Little Falls Co., 46 Minn 260, which does sustain the plaintiff's contention. We think th a stockholder's right to assert a cause of action belonging to the co poration depends upon allegations that the corporation — acti fraudulently, in breach of trust or ultra vires. For this reason must go into equity. On the other hand, there appears to us to be ground for holding that stockholders may bring actions at law in th name of the corporation to recover money damages or specific pro erty whenever the corporation refuses to do so. Ames v. America Telegraph & Telephone Co., 166 Fed. Rep., 820. Such a practi would be likely to create great confusion and tend unnecessarily take away from the corporation the management of its own affai

The judgment is affirmed.

F. E. M. Bullowa for the Plaintiff-in-Error.

Louis Marshall and John A. Garver for the Defendants-in-Erro

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 23rd Day of April, One Thousand Nine Hundred and Fifteen.

Present: Hon. Alfred C. Coxe, Hon. Henry G. Ward, Hon. Henry Wade Rogers, Circuit Judges.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs-in-Error,
vs.
AMALGAMATED COPPER COMPANY et al., Defendants in Error.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

A. C. C.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Endorsed: United States Circuit Court of Appeals, Second Circuit. United Copper Co. vs. Amalgamated Copper Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 27, 1915. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs-in-Error,
against
AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, Adolph Lewisohn, Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn, and Philip S. Henry, as Executors and Trustees of the Last Will and Testament of Leonard Lewisohn, Deceased; Red Metals Company, William Rockefeller, John W. Sterling, Farmers Loan & Trust Company, and Henry H. Rogers, as Executors and Trustees of the Last Will and Testament of Henry H. Rogers, Deceased; John D. Ryan, James Stillman, and United Copper Company, Defendants-in-Error.

Petition for Writ of Error.

Your petitioners, United Copper Securities Company and Arthur P. Heinze, plaintiffs-in-error in the above entitled cause, respectfully

show that the above entitled cause is now pending in the Uni
States Circuit Court of Appeals for the Second Circuit and tha
mandate has therein been rendered on the 27th day of April, 19
affirming a judgment of the District Court of the United States
the Southern District of New York, and that the matter in con
versy in said action exceeds $1,000 besides costs, and that the juris
tion of none of the Courts above mentioned is or was dependent
any wise upon the opposite parties to the suit or controversy be
aliens and citizens of the United States or citizens of the differ
states, and that this cause does not arise under the patent laws,
the revenue laws, nor the criminal laws, and that it is not an
miralty case, and that it is a proper case to be reviewed by the
preme Court of the United States upon writ of error; and theref
your petitioners would respectfully pray that a writ of error be
lowed them in the above entitled cause directing the Clerk of
United States Circuit Court of Appeals for the Second Circuit to s
the record and proceedings in said cause with all things concern
the same, to the Supreme Court of the United States in order that
errors complained of in the assignment of errors herewith filed
said plaintiffs-in-errors may be reviewed, and if error be found,
rected according to the laws and customs of the United States.

UNITED COPPER SECURITIES COM
PANY AND
ARTHUR P. HEINZE,
By FERDINAND E. M. BULLOWA,
Their Attorney

Office & Post Office Address, 34 Nassau Street, Borough of M
hattan, New York City.

The foregoing petition is granted and writ of error allowed
prayed for, upon plaintiffs-in-error giving bond according to law
the sum of $250.

Dated, June 24th, 1915.

H. G. WARD,
Judge of United States Circuit Court

(Endorsed:) United States Circuit Court of Appeals for the S
ond Circuit. United Copper Securities Company, and ano., Pl
tiffs-in-Error, against Amalgamated Copper Company et al., Defe
ants-in-Error. Petition for Writ of Error. Ferdinand E. M. B
lowa, Attorney for Plaintiffs-in-Error, 34 Nassau Street, New Y
City. United States Circuit Court of Appeals, Second Circuit. F
Jun- 24, 1915. William Parkin, Clerk.

COPY BOU

United States Circuit Court of Appeals for the Second Circuit.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs-in-Error,
against
AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, Adolph Lewisohn, Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn, and Philip S. Henry, as Executors and Trustees of the Last Will and Testament of Leonard Lewisohn, Deceased; Red Metals Company, William Rockefeller, John W. Sterling, Farmers Loan & Trust Company, and Henry H. Rogers, as Executors and Trustees of the Last Will and Testament of Henry H. Rogers, Deceased; John D. Ryan, James Stillman, and United Copper Company, Defendants-in-Error.

Assignment of Errors.

And now come the plaintiffs-in-error, by Ferdinand E. M. Bullowa, their attorney, and say that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Second Circuit, in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiffs-in-error in this, to wit:

First. Said Circuit Court of Appeals erred in entering its mandate affirming the judgment of the District Court of the United States for the Southern District of New York, dismissing the complaint of the plaintiffs and for costs, entered on September 24th, 1914, in favor of said defendants-in-error and against said plaintiffs-in-error.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court aforesaid, and in not remanding said cause to said District Court for trial.

Third. Said Circuit Court of Appeals erred in not reversing the direction of the United States District Court that the complaint herein be dismissed.

Fourth. Said Circuit Court of Appeals erred in not reversing the order of the said United States District Court for the Southern District of New York, sustaining the demurrers of the defendants to the complaint.

Fifth. Said Circuit Court of Appeals erred in not reversing the order of said United States District Court granting the motion of the defendants upon which said order was made.

Sixth. Said Circuit Court of Appeals erred in not reversing said order, and the judgment entered thereon.

Wherefore, the said plaintiffs-in-error, pray that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiffs-in-error the said mandate of the said United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that said cause be remanded to the United States District Court for the Southern District of New York, with in-

CLOSE IN CENTER

structions to grant a trial in said cause, or for such further proceedings in said cause as may be determined upon by this Honorable Court, to the end that justice may be done in the premises.

FERDINAND E. M. BULLOWA,
Attorney for Plaintiffs-in-Error.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit. United Copper Securities Company, and ano., Plaintiffs-in-Error, against Amalgamated Copper Company et al., Defendants-in-Error. Assignment of Errors. Ferdinand E. M. Bullowa, Attorney for Plaintiffs-in-Error, 34 Nassau Street, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 24, 1915. William Parkin, Clerk.

Southern Surety Company.

Bonds, Surety, Fidelity, Insurance, Health, Accident, Plate Glass, Automobile, Burglary, Compensation, Liability.

General Offices, New National Bank of Commerce Bldg., St. Louis.

United States Circuit Court of Appeals for the Second Circuit.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs-in-Error,
against
AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, Adolph Lewisohn, Frederick Lewisohn, Walter Lewisohn, Alberto Lewisohn, and Philip S. Henry, as Executors and Trustees of the Last Will and Testament of Leonard Lewisohn, Deceased; Re Metals Company, William Rockefeller, John W. Sterling, Farmers Loan & Trust Company, and Henry H. Rogers, as Executors and Trustees of the Last Will and Testament of Henry H. Rogers, Deceased; John D. Ryan, James Stillman, and United Copper Company, Defendants-in-Error.

Know all men by these presents, That we, the above named Plaintiffs-in-error, as Principal, and Southern Surety Company, a corporation organized under the Laws of the State of Oklahoma, lawfully transacting business in the State of New York, and having an office at No. 31 Liberty St., Borough of Manhattan, City of New York, as Surety, are held and firmly bound unto the above named defendants-in-error in the full and just sum of two hundred and fifty ($250.00) dollars, to be paid to the said defendants-in-error, their attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of June A. D. in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a United States Circuit Court of Appeals for the second circuit in a suit pending in said Court, between the above

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aintiffs-in-error, and the above named Defendants-in-error,
e was entered affirming a judgment rendered against the
ntiffs-in-error, and the said Plaintiffs-in-error having ob-
vrit of error and filed a copy thereof in the Clerk's office of
Court to reverse the judgment in the aforesaid action, and a
directed to the said Defendants-in-error citing and admon-
em to be and appear at a session of the Supreme Court of
d States to — holden at the City of Washington on the —
— next.

he condition of the above obligation is such, That if said
-in-error shall prosecute said writ of error to effect and an-
damages and costs if they fail to make their plea good, then
ligation to be void, else to remain in full force and virtue.

ARTHUR P. HEINZE. [L. S.]
UNITED COPPER SECURITIES COMPANY,
AL.] By CALVIN O. GEER, *President.*
SOUTHERN SURETY COMPANY,
AL.] By HULBERT T. E. BEARDSLEY,
Attorney-in-Fact.

l and delivered in —.
AWRENCE E. BROWN.

Southern Surety Company.

Surety, Fidelity, Insurance, Health, Accident, Plate Glass, Automobile, Burglary, Compensation, Liability.

Offices, New National Bank of Commerce Bldg., St. Louis.

D COUNTY OF NEW YORK, *ss:*

his 23d day of June, 1915, before me personally came Calvin
, who, being by me duly sworn, did depose and say, that he
in East Orange, New Jersey; that he is President of United
Securities Company, the corporation described in, and which
d the foregoing instrument; that he knows the corporate seal
corporation; that the seal affixed to said instrument is such
te seal; that it was so affixed by order of the Board of Direct-
aid Corporation, and that he signed his name thereto by like

LAWRENCE E. BROWN,
Commissioner of Deeds, City of New York.

n Expires May 11, 1917.
ificate filed.
k Kings Co. No. 264.
ister's No. 7066.
k N. Y. Co. No. 1176.
ister's No. 17095.

IN CENTER

CITY AND COUNTY OF NEW YORK, *ss:*

On this 23rd day of June, 1915, before me personally came Arthur P. Heinze to me known and known to me to be one of the persons described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

LAWRENCE E. BROWN,
Commissioner of Deeds, City of New York.

Term Expires May 11, 1917.
Certificate filed.
Clerk Kings Co. No. 264.
Register's No. 7066.
Clerk N. Y. Co. No. 1176.
Register's No. 17095.

Southern Surety Company.

General Offices New National Bank of Commerce Building, St. Louis, Missouri.

Power of Attorney.

NOTE.—Power of Attorney must be attached to each bond, signed by agents in state of New York.

At a legal and lawful meeting of the Board of Directors of the Southern Surety Company held at its office in St. Louis, Mo., on the 2nd day of January, 1913 the following resolution was adopted, to-wit:

Whereas, The Southern Surety Company, in order to facilitate its business of becoming surety on bonds, is required to execute bonds in places other than the home office upon application being made for same; and

Whereas, Hulbert T. E. Beardsley of New York City, State of New York, has been appointed Agent and Attorney-in-Fact for said company,

Be it resolved, That the said Hulbert T. E. Beardsley be and he is hereby appointed Attorney-in-fact for said company, and that as such Attorney-in-fact he be and is hereby authorized to execute, sign, seal and deliver for and on behalf of the Southern Surety Company: any and all bonds and undertakings.

Condition. Any and all such bonds, obligations and undertakings shall be executed in the name of the Southern Surety Company by said Hulbert T. E. Beardsley as Attorney-in-fact for said company, who shall attach the seal of the company thereto. Any and all such bonds, obligations and undertakings so executed shall be binding upon the said Southern Surety Company to all intents and purposes as fully as if done by the regular officers of the company in their own proper persons in its behalf.

I, E. G. Davis, Secretary of the Southern Surety Company, have

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ared the foregoing extract and transcript with the original
of, as recorded in the minute book of the said company, and do
y certify that the same is a true and correct transcript there-
and of the whole of said original resolutions.
ven under my hand and seal of the company at St. Louis, Mo.,
31st day of March, 1914.

E. G. DAVIS, *Secretary.*

Extract from By-laws.

it remembered, that at a meeting of the Stockholders of the
hern Surety Company, duly called and held on the 8th day of
ary, 1912, a quorum being present, the following by-law was
ted:

Article IV.

CTION 8. That the President, or any Vice-President, or the Sec-
y, or the Board of Directors, may, from time to time, by written
r-of-attorney, appoint attorneys-in-fact; and either the Presi-
, or any Vice-President, or Secretary, or the Board of Directors,
, at any time remove any such attorney-in-fact and revoke the
r and authority given him.
ttorneys-in-fact, may, by a written power-of-attorney, be given
full power and authority to sign, seal and execute for and in the
e and on behalf of the Company, any and all bonds, recog-
nces, contracts of indemnity and other written obligations in the
ire of a bond, recognizances or conditional undertaking, to the
nt and in the manner as may be provided in such power-of-at-
ey, and to bind the Company thereby as fully and to the same
nt as if signed by the president and sealed and attested by the
etary.

TE OF NEW YORK,
County of New York,
City of New York, ss:

, Hulbert T. E. Beardsley, Attorney-in-Fact of the Southern
ety Company, have compared the foregoing by-law with the orig-
l thereof, as recorded in the book of by-laws of said company and
certify that the same is a true transcript therefrom and the whole
said original by-law.
Given under my hand and seal of the Company, this 15th day of
nuary 1915.

HULBERT T. E. BEARDSLEY,
Attorney-in-Fact.

ATE OF NEW YORK,
County of New York, ss:

On this 7th day of June in the year one thousand nine hundred
d fifteen before me personally came Hulbert T. E. Beardsley to me
own, who, being by me duly sworn, did depose and say that he

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resided in the City of New York: that he is the Attorney-in-Fact of Southern Surety Company the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

PHILIP H. FETT,
Notary Public, Kings County, #35.

Register's Office #6631.
Certificate filed in N. Y. Co. #36.
Register's Office #6102.
Certificate filed in Bronx County #6.
Register's Office #620.
Certificate filed in Queens County #623.
My Commission expires March 30, 1916.

(Endorsed:) United States Circuit Court of Appeals. United Copper Securities Company and Arthur P. Heinze, Plaintiffs-in-error, vs. Amalgamated Copper Co. et al., Defendants-in-error. Undertaking on Appeal. Surety: Southern Surety Company. Ferdinand E. M. Bullowa, Attorney and Counsellor at Law, Mutual Life Building, 32 Nassau St., New York. Approved as to form and sufficiency of surety. Dated June 24, 1915. H. G. Ward, U. S. C. C. United States Circuit Court of Appeals, Second Circuit. Filed June 24, 1915. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 60 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United Copper Securities Company and another, against Amalgamated Copper Company, et al. as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 8th day of July in the year of our Lord One Thousand Nine Hundred and fifteen and of the Independence of the said United States the One Hundred and fortieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

[United States internal revenue documentary stamp, series 1914, ten cents, canceled.]

United States Circuit Court of Appeals for the Second Circuit.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs-in-Error,
against
AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, Adolph Lewisohn, Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn, and Philip S. Henry, as Executors and Trustees of the Last Will and Testament of Leonard Lewisohn, Deceased; Red Metals Company, William Rockefeller, John W. Sterling, Farmers Loan & Trust Company, and Henry H. Rogers, as Executors and Trustees of the Last Will and Testament of Henry H. Rogers, Deceased; John D. Ryan, James Stillman, and United Copper Company, Defendants-in-Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the above named defendants, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein United Copper Securities Company and Arthur P. Heinze are plaintiffs-in-error and you are defendants-in-error, to show cause, if any there be, why the judgment rendered against the said plaintiffs-in-error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, — Justice of the Supreme Court of the United States, this 24th day of June, in the year of our Lord one thousand nine hundred and fifteen.

H. G. WARD.
Judge of United States Circuit Court.

[Endorsed:] United States Circuit Court of Appeals for the Second Circuit. United Copper Securities Company, and ano., Plaintiffs-in-Error, against Amalgamated Copper Company, et al., Defendants-in-Error. Citation. Ferdinand E. M. Bullowa, Attorney for Plaintiffs-in-Error, 34 Nassau Street, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 30, 1915. William Parkin, Clerk.

Service of a copy of the within this day admitted.
Dated June 25, 1915.

SHEARMAN & STERLING,
Att'ys for Def'ts, Amal. Copper Co. et al.
GUGGENHEIMER, UNTERMYER & MARSHALL, *Att'ys for Def't A. Lewisohn.*
HOADLY, LAUTERBACH & JOHNSON,
Att'ys for Def't Estate of L. Lewisohn.

United States Circuit Court of Appeals for the Second Circuit.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE, Plaintiffs-in-Error,
against
AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, Adolph Lewisohn, Frederick Lewisohn, Walter Lewisohn, Allen Lewisohn, and Philip S. Henry, as Executors and Trustees of the Last Will and Testament of Leonard Lewisohn, Deceased; Rio Metals Company, William Rockefeller, John W. Sterling, Farmers Loan & Trust Company, and Henry H. Rogers, as Executors and Trustees of the Last Will and Testament of Henry H. Rogers, Deceased; John D. Ryan, James Stillman, and United Copper Company, Defendants-in-Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the mandate which is in the said Circuit Court of Appeals before you or some of you, between the above named plaintiffs-in-error and the above named defendants-in-error, a manifest error hath happened, to the great damage of the said plaintiffs-in-error as by their complaint appears. We being willing that error, if any hath been done, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 24th day of June, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the Circuit Court of Appeals of the United States for the 2d Circuit.

Allowed this 24 day of June, 1915, by
H. G. WARD,
Judge of United States Circuit Court.

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Endorsed:] United States Circuit Court of Appeals for the Second uit. United Copper Securities Company, and ano., Plaintiffs-in-or, against Amalgamated Copper Company, et al., Defendants-in-or. Writ of Error. Ferdinand E. M. Bullowa, Attorney for ntiffs-in-Error, 34 Nassau Street, New York City. United States uit Court of Appeals, Second Circuit. Filed Jun- 30, 1915. liam Parkin, Clerk.

ervice of a copy of the within this day admitted.
ated June 25, 1915.

SHEARMAN & STERLING,
Att'ys for Def'ts, Amal. Copper Co. et al.
GUGGENHEIMER, UNTERMYER & MARSHALL, *Att'ys for Def't A. Lewisohn.*
HOADLY, LAUTERBACH & JOHNSON,
Att'ys for Def't Estate of L. Lewisohn.

ndorsed on cover: File No. 24,862. U. S. Circuit Court Appeals, Circuit. Term No. 579. United Copper Securities Company and aur P. Heinze, plaintiffs in error, vs. Amalgamated Copper Company, Anaconda Copper Company, Adolph Lewisohn et al. Filed 27th, 1915. File No. 24,862.

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FILED
FEB 19 1917
JAMES D. MAHER
CLERK

United States Supreme Court

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs-in-Error
(Plaintiffs below),

against

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, UNITED COPPER COMPANY et al.,
Defendants-in-Error
(Defendants below).

October Term, 1916.
No. 208.

BRIEF FOR PLAINTIFFS-IN-ERROR.

FERDINAND E. M. BULLOWA,
Attorney for Plaintiffs-Appellants.

FERDINAND E. M. BULLOWA,
RALPH JAMES M. BULLOWA,
of Counsel.

The Heck Press, 49 Warren St., N. Y. Tel. 3240 Barclay.

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To be Argued by

FERDINAND E. M. BULLOWA.

United States Supreme Court

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE, Plaintiffs-in-Error (Plaintiffs below), against AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, UNITED COPPER COMPANY *et al.*, Defendants-in-Error (Defendants below).	October Term, 1916. No. 208.

BRIEF FOR PLAINTIFFS-IN-ERROR.

Statement of the Case.

This is a writ of error (p. 56) duly sued out by the plaintiffs-in-error in the United States Circuit Court of Appeals for the Second Circuit, who were the plaintiffs in the United States District Court for the Southern District of New York, to review the judgment of said Circuit Court of Appeals (p. 47) affirming a judgment (fols. 88-95) of said United States District Court, sustaining the demurrers (fols. 76-81) of the defendants and dis-

missing the complaint (fol. 92), entered upon an order made by Hon. E. Henry Lacombe, United States Circuit Judge (fols. 82-86).

The summons in this action at law was issued on the 3rd day of May, 1912 (fol. 16). The amended complaint sets up a cause of action under the Sherman Act in the right of the defendant United Copper Company, by the plaintiffs who are shareholders thereof (fol. 23). It is alleged that although demand was made upon the United Copper Company, by the shareholders, to institute this action, it refused so to do (fol. 24). A cause of action in behalf of the United Copper Company, by reason of injury to its business and property, flowing from a wrongful conspiracy and combination of the defendants, other than the defendant United Copper Company, in restraint of interstate commerce in violation of the Sherman Act, is alleged (fols. 29 *et seq.*). The defendants Lewisohn and others demurred to the amended complaint (fols. 77 to 80). They brought said demurrers on for argument, by motions pursuant to Section 547 of the Code of Civil Procedure of the State of New York, for judgment upon the pleadings—the complaint and demurrer—and for the dismissal of the complaint, upon the grounds that the complaint does not state facts sufficient to constitute a cause of action, and that the cause of action cannot be maintained at law. Said section reads as follows: "If either party is entitled to judgment upon the pleadings, the court may upon motion at any time after issue joined give judgment accordingly." The District Court granted the motion (fol. 83), sustained the demurrers and entered judgment accordingly (fol. 90). It is apparent from the opinions (fol. 123) that the precise question decided by the District Court and the Circuit Court of

Appeals is that this action at law in the right of the United Copper Company is not maintainable by the shareholders, nominal plaintiffs of record, to recover for damages suffered by the United Copper Company, for violation of the Sherman Act, by the defendants.

Specification of the Errors Relied Upon.

The plaintiffs duly filed an assignment of five errors (fol. 112), all of which raise the single question above stated—the sufficiency of the complaint in this action at law instituted by the shareholders, nominal plaintiffs, in the right of the United Copper Company, to recover damages suffered by the United Copper Company in its business and property, by reason of the conspiracy and combination among the defendants, in restraint of interstate commerce and trade in violation of the Sherman Act. The plaintiffs specify and intend to rely upon all of the five errors assigned.

The Argument and Points.

The action is brought by stockholders of the United Copper Company, upon a cause of action vested in the defendant United Copper Company, to enforce on behalf of that corporation, a claim of that corporation against persons and corporations, engaged in a conspiracy against it, in restraint of interstate trade and commerce, in violation of the Sherman Act, which culminated in damages to business and property of the said United Copper Company.

There is no allegation in the complaint that would give to the plaintiffs individually, and for

themselves only, a cause of action against any of the defendants, it not being alleged that the acts complained of have caused any direct injury to the plaintiffs, or depreciated the value of the stock held by them, other than as stockholders in the corporation. The Court is asked to enforce a demand in favor of the defendant United Copper Company by rendering judgment against the other defendants for the amount of the damages sustained by the United Copper Company, by reason of the violation of the Sherman Act, by the other defendants.

No damage to the plaintiffs as individual shareholders is alleged and no recovery is sought for damage to the plaintiffs or to their shareholdings. The conspiracy of the other defendants is alleged to have damaged the United Copper Company and the damage to have been suffered by the United Copper Company.

The plaintiffs seek only to have the United Copper Company recover damages, and the action is a representative one in the right of the corporation, the plaintiffs suing on their own behalf, and on behalf of all other stockholders of the United Copper Company.

The complaint in effect alleges and the demurrers admit, that the nominal plaintiff Arthur P. Heinze has since 1902 been the lawful owner of upwards of 100 shares of the common capital stock of the United Copper Company, and that the nominal plaintiff, United Copper Securities Company, has since January, 1912, been the lawful owner of upwards of 100 shares (fol. 24); the defendant Amalgamated Copper Company was formed with the plan of suppressing competition, and of maintaining a monopoly in interstate commerce in copper; that in pursuance of such plan the defendants

acted in combination and conspiracy in restraint of the United Copper Company's trade; that the trade restrained was interstate; that unlawful acts were done by the defendants to attain such restraint of the United Copper Company's trade; that thereby the competition of the defendant United Copper Company has been destroyed, and the monopoly of the defendants sustained, and the United Copper Company's property and business injured; and that the right to damages under the Sherman Act in favor of the United Copper Company is suffered to remain unenforced by that corporation, after demand by plaintiff-stockholders that it enforce the same.

The Complaint.

The allegations of the complaint may be briefly summarized as follows:

> That the defendant United Copper Company is a corporation organized under the laws of the State of New Jersey (fol. 22), and each of the plaintiffs is a stockholder thereof (fols. 23, 24); that said corporation was organized to acquire the stock of the Montana Ore Purchasing Company, the Nipper Consolidated Copper and Silver Mining Company, the Corra Rock Island Mining Company, the Minnie Healy Mining Company and the Belmont Mining Company which were mining and trading companies dealing in copper in interstate commerce, and through such stock ownership, to continue the business of said companies; that said corporation did acquire the stock of said companies and did endeavor to continue the said business of said companies (fols. 41, 42).

That prior to the organization of said corporation the defendant Adolph Lewisohn and other persons associated with him controlled the Boston & Montana Copper & Silver Mining Company and the Butte & Boston Consolidated Mining Company, which were corporations engaged in interstate commerce in copper, and conceived that a monopoly therein would be profitable and entered into a combination and conspiracy to bring it about, by unfair and unlawful means (fols. 33, 34); that the defendants Anaconda Copper Mining Company, Rockefeller and Stillman and others joined said combination and conspiracy and set about to form a copper trust (fols. 35, 36); that said defendants and others caused the defendant Amalgamated Copper Company to be incorporated for the purpose of carrying out said conspiracy, and to exclude all participation in interstate commerce in copper. Said Amalgamated Copper Company did acquire the majority of the stock of the defendant Anaconda Copper Mining Company, the Parrot Copper & Silver Mining Company and all of the stock of the Colorado Smelting & Refining Company and all of the stock of the Boston & Montana Copper & Silver Mining Company and the Butte & Boston Consolidated Mining Company (fols. 37, 38).

That after the incorporation of said Amalgamated Copper Company, and the acquisition of the stock of said companies by it, the said Amalgamated Copper Company and the defendants Rockefeller, Stillman and Ryan operated and controlled the affairs of said Amalgamated Copper Company with the purpose of accomplishing the undue and unrea-

sonable restraint of interstate trade and commerce in copper and of destroying competition therein (fol. 39); that the said defendants with the said purpose did in combination and conspiracy a great number of wrongful, malicious and unlawful acts and used a great number of wrongful, malicious and unlawful means (fols. 40, 41); that after the incorporation of the defendant United Copper Company the said unlawful and malicious acts were directed against the United Copper Company and the companies acquired by it (fols. 42, 43); among the unlawful and malicious acts were the institution and prosecution of wrongful and malicious suits and proceedings (fol. 44), and unlawful and malicious attacks upon the credit and standing of the United Copper Company throughout the financial world (fol. 52); that said attacks upon the United Copper Company were made in pursuance of the plan and purpose to suppress and eliminate competition and to support and protect the monopoly of the defendants, aforesaid and to prevent the defendant United Copper Company from doing business and thereby destroying the competition of said company (fols. 66, 67).

That the defendants have by the unlawful means aforesaid prevented the United Copper Company from competing in the business of mining and trading in copper (fol. 69); and impaired its ability to continue in said business and have destroyed its credit and standing and unduly and unreasonably restrained interstate commerce and trade in copper (fols. 63, 64); that the plan of the defendants has been effected and accom-

plished in that the competition of the United Copper Company has been destroyed and the monopoly of the Amalgamated Copper Company and other defendants sustained (fols. 65, 70).

That thereby the United Copper Company was greatly injured in its business and property in that its annual profits were greatly reduced and its expenditures greatly increased (fol. 57) and it was deprived of its business and property and forced to dispose of the same to the defendants at a price far below the value (fol. 59).

That the plaintiffs as stockholders of the defendant United Copper Company demanded that an action be instituted for the damages sustained by reason of the premises, and that said defendant company failed and refused to comply with such demand (fol. 24).

Wherefore the plaintiffs demand judgment that each of the defendants be compelled to pay the damages sustained by the defendant United Copper Company (fol. 72).

The Cause of Action.

It is clear (1) that the unlawful things alleged and *admitted* to have been done by the defendants, are those denounced by both §§1 and 2 of the Sherman Act.

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any

such combination or conspiracy shall be deemed guilty of a misdemeanor. * * *

"Section 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *"

and (II) that the injury thereby sustained to the business and property of the United Copper Company gives it a cause of action for its damages under the provisions of §7 of the act.

"Section 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefore in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

and (III) that the United Copper Company suffers its right to remain unenforced, after demand by the plaintiff-stockholders that it enforce the same.

The complaint states facts sufficient to establish the foregoing cause of action. It alleges the facts showing the cause of action in favor of the United Copper Company and the facts which entitle the plaintiffs to maintain the action in place of the company, and no other allegations are necessary.

Speaking of a cause of action brought by a stockholder on behalf of the stockholders of a corporation in the right of the corporation, the Court of Appeals in *Kavanaugh* vs. *Commonwealth Trust Co.*, 181 N. Y., 121, 124, succinctly laid down the rule, repeatedly enunciated both by the federal and state courts as follows:

> "It is quite plain that the complaint in such an action should set forth but two things: *First*, the cause of action in favor of the corporation, which should be stated in exactly the same manner and with the same detail of facts as would be proper in case the corporation itself had brought the action; *second*, the facts which entitle the plaintiff to maintain the action in place of the corporation, that he is a stockholder therein, and that the corporation itself has either refused or unreasonably failed to bring the action. Ordinarily no other allegations are necessary or material."

It was not necessary for the plaintiffs to allege any of the matters required to be alleged in bills in equity by rule 27 (former rule 94) of the Equity Rules of the Supreme Court. The practice in the federal courts is distinct at law and in equity, and the equity rules do not govern the practice at law, which by §914 of the Revised Statutes is conformed "as near as may be" to the practice in the state courts. In equity cases in the federal courts the requirements of Equity Rule 94 (now rule 27) are strictly enforced, when applicable, because of the necessity of preventing the wrongful imposition of litigation upon the federal courts, by the collusive making of parties who can invoke its jurisdiction. The rule has, however, no application even in

equity, where, as in the present case, the jurisdiction is not dependent on diverse citizenship. This was held by Judge WARD in *Lindsley* vs. *Natural Carbonic Gas Co.*, 162 Fed. Rep., 954, at p. 957, and clearly stated in Street's Federal Equity Practice at page 295, §474.

The cause of action can be maintained at law, by the plaintiffs on behalf of the United Copper Company.

It will no doubt be conceded that the United Copper Company itself could maintain the action at law, since the demurrers admit the facts pleaded. The seventh section of the act "permits a person—which word, by the eighth section, includes a corporation—to bring an action at law to recover treble damages." *Fleitmann* vs. *Welsbach Street Lighting Company*, 240 U. S., 27; aff'g 211 Fed. Rep., 103. It will no doubt be conceded that the Receiver or Trustee of the corporation would be permitted to bring this action at law under the Sherman Act in place of the corporation. *Strout* vs. *United Shoe Machinery Co.*, 195 Fed. Rep., 313.

But it will be contended that the plaintiffs cannot maintain the action at law, in the stead of the United Copper Company, and that, as suggested by the demurrer, if the plaintiffs can maintain the action in the place of the United Copper Company, they must do so in equity. Judge COXE held that an action by a single shareholder could not be maintained in equity, and the decision of the Circuit Court of Appeals for the Second Circuit, in a *per curiam* opinion LACOMBE, WARD and ROGERS, *JJ.*, affirming the opinion of Judge COXE

in the *Fleitmann* case, *supra*, at p. 105 (aff'd 240 U. S., 27), held:

> "We are clearly of the opinion that an action to recover treble damages under section 7 of the act must be an action at law, where defendants have the constitutional right to a jury trial."

That affirmance should preclude an argument that the action is maintainable in equity. The decision in the Circuit Court of Appeals is based on the fact that *the intrinsic nature of the cause of action given by the said section of the act is unquestionably in tort and purely legal.* The section provides a civil remedy for a private injury arising in tort. At common law the character of the right of action was in tort, and it is in tort under the statute. In *Metcalf* vs. *American School Furniture Co. et al.*, 108 Fed. Rep., 909 (aff'd 113 Fed. Rep., 1020, WALLACE, LACOMBE and SHIPMAN, *C. JJ.*), a demurrer to a bill seeking equitable relief, and also treble damages under the Sherman Act was sustained on the ground that it was multifarious. The District Court, at p. 912, speaking through Judge HAZEL, said:

> "Section 7 of the federal act of 1890 is declaratory of a common-law right which existed in favor of parties injured by wrongs enumerated in other sections of that act, and confers jurisdiction to seek a remedy, and with treble damages, in a federal tribunal. *The character of the right of action is in no way changed, and still remains one in tort.*"

The sole question accordingly is whether the rule that one or more shareholders may sue upon a

cause of action in the right of the corporation, where it neglects to sue, is limited to causes of action which may be brought in equity, and that purely legal rights may not be enforced by shareholders in the right of the corporation neglecting to sue. *If such were the rule it would be because the jurisdiction of the court at law depends not on the intrinsic nature of the action, but upon the character of the parties instituting the suit.* There are authorities to the contrary of such proposition, and to support the maintenance of the action at law by the shareholders in the right of the corporation. The history of the rule permitting an action by shareholders in the right of the corporation negatives such limitation.

It was held in *Sheridan* vs. *Electric Light Co.*, 38 Hun, 396 (1886), at p. 398, that the corporation defendant in the stockholders action to recover moneys in the right of the corporation, received by agents of the company, could itself appeal from an adverse verdict in form in its favor: CHARLES DANIELS, *J.*, NOAH DAVIS, *P. J.*, and JOHN R. BRADY, *J.*, concurring, said:

> "The verdict in the case was in favor of the contesting defendants. The company, at the time of the trial, had passed into the control of other officers, and it accordingly acquiesced, as far as that practically could be done in the action brought by the plaintiff, and then concurred with him in the assertion of its right to recover against the defendants. As this right was defeated at the trial, the company, as well as the plaintiff, was entitled to appeal from the judgment and the order denying a new trial, for the allegations contained in the

plaintiff's complaint disclosing the right of action were in legal effect those of the company itself, but which it was not permitted to make, by reason of the misconduct of other officers of the corporation. And when the verdict was recovered by the defendants, the company was injured and aggrieved by that judgment, if, in truth, a right of action was maintained by the evidence upon the trial" (p. 398).

"It was permitted to be brought into court by the individual plaintiff as a party in whose favor he asserts the right to have the action maintained. *Its rights were the meritorious cause of action and when they were defeated by the verdict, it was the party aggrieved by that result*" (p. 399).

In *Morrill* vs. *Little Falls Man. Co.*, 46 Minn., 260, Judge COLLINS, at p. 265, held:

"This is the elementary doctrine that a stockholder may sue both at law and in equity in his own name, in behalf of the company's interest, where it cannot or will not do so in its corporate capacity. And under like circumstances a stockholder may defend in his own name an action brought against a corporation."

In *Gray* vs. *Lewis*, 29 *Law Times*, 12 (1873), a suit *brought by a stockholder* of Charles Lafitte and Co., Lord Justice JAMES, at p. 14, said:

"*The next question is whether, supposing the bill to be a bill by Charles Lafitte and Co., which it is really*, if it is anything at all —whether it is possible to sustain it. It is utterly impossible to sustain the bill, except

as a bill by which the company is seeking to recover money. The case by the company against the bank is really this, and it is in my opinion a simple action at law. They say, 'You, the bank, have got moneys in your hands, moneys paid into your bank to our account, and for which therefore you are liable to us; they are moneys had and received to our use, and you are our debtors to that amount; true it is you say that you have in your own books discharged yourself of 230,000£ of those moneys which you have so received by applying them in payment of certain bills of exchange under an authority signed by some of our directors.' That authority is perfectly idle. It was entirely *ultra vires*. The bank knew it was *ultra vires*, and the directors knew it was *ultra vires*. Therefore the remedy against the bank remains exactly as if no such idle paper had been signed. It may be a wrong thing for directors to say to a man, 'You may pay yourself a debt, you need not pay a debt to our company, but if it is idle and inoperative in point of law, and of equity, assuming it to be entirely *ultra vires* there is nothing whatever left but a simple action by the company against their bankers, exactly the same action as that which was brought in the Court of Exchequer in *The British and American Telegraph Company* vs. *The Albion Bank* (26 L. T. Rep., N. S., 257; L. Rep., 7, Ex. 119) for moneys actually paid in much the same way as they were paid in this case. *Therefore it appears to me that the proper action is an action at law, and there is no reason on earth why the forum should be changed.*"

In *Godfrey* vs. *McConnell*, 151 Fed. Rep., 783, a bill in equity by a shareholder on behalf of a corporation was dismissed by Judge HUNT, on the ground that there was no ground for equity jurisdiction, it being solely to recover money damages.

In *Flynn* vs. *Brooklyn City R. R. Co.*, 158 N. Y., 493, at p. 508, it is stated by VANN, *J.*:

> "The right of action, however, belongs to the corporation, and should be brought by it as plaintiff, but when it will not bring the suit itself, an aggrieved stockholder, after due demand and a refusal, or unreasonable neglect to proceed, may bring it in his own name upon making the corporation a party defendant (*Greaves* vs. *Gauge*, 69 N. Y., 154). Such an action is not for the benefit of the plaintiff alone, but is representative in character and for the benefit of himself and all other stockholders similarly situated."

In *Niles* vs. *N. Y. C. & H. R. R. Co.*, 69 App. Div., 144, 147, aff'd 176 N. Y., 119, the Appellate Division of the Supreme Court for the First Department, considering a wrong to a corporation which it expressly held to be an actionable tort, said:

> "*The action by or in the right of the corporation may be at law* where the damages are susceptible of proof in such an action (*Sayles* v. *White*, 18 A. D., 590)."

In *Sayles* vs. *White*, 18 App. Div., 590, a stockholder's action against directors of the defendant Central National Bank of Rome, cited by the Court

in the *Niles* case, *supra,* Judge WARD, at p. 597, said:

> "If the fact that the stockholder does bring the action, and, under the circumstances of the case is compelled to bring it, of itself, makes the action an equitable one, we possibly may say that it is an equitable action, and so distinguish it from the other cases; but this view is embarrassed by the fact that the Court of Appeals has made the rule of distinction as between legal and equitable actions in such cases, * * * to depend upon the intrinsic nature of the action, and not upon the character of the parties instituting it."

In *Morawetz on Private Corporations,* Sec. Ed., p. 258, §271, it is said:

> "The essential character of a cause of action remains the same, whether the suit to enforce it be brought by the corporation or by a shareholder."

The rule with respect to the bringing of actions by stockholders in behalf of the corporation is stated in *Thompson on Corporations,* Sec. Ed., Vol. 4, Chap. 135, §4552, as follows:

> "Wherever a cause of action exists primarily in behalf of the corporation, against directors, officers, and others, for wrongful dealing with corporate property, or wrongful exercise of corporate franchises, so that the remedy should regularly be obtained through a suit in the name of the corporation, and the corporation either actually or virtually refuses to institute or prosecute such a suit, then, in order

to prevent a failure of justice, an action may be brought and maintained by a stockholder or stockholders."

In *Continental Securities Co.* vs. *Belmont,* 206 N. Y., 7, the Court, at p. 17, quoted from Cook in his work on Stock and Stockholders, Section 740, as follows:

"There has been considerable discussion as to whether the stockholder, in addition to his request to the corporate officers to institute the suit, should not also be required to attempt to induce the stockholders in meeting assembled to take action by directing the directors to bring suit or by refusing to re-elect them at the next election. The facts, however, that the stockholders in meeting assembled cannot control the discretion of the directors in bringing such a suit; that the remedy of refusing to re-elect them involves delay, and the assumption that a minority of the stockholders can by the election control such a suit; that irreparable injury or the vesting of great financial interests may occur in the meantime, and that laches may arise as a bar to the stockholder's suit, have settled the rule that the stockholder's request to the corporate directors to institute the suit is sufficient. He need not also apply to a stockholders' meeting."

The History of the Rule.

The history and underlying reason for the rule —"the claims of justice"—preclude a limitation of it to equity jurisdiction. The action is in fact that of the corporation. "The avails of the litigation, if there be any, go to the corporation and are a

part of its means, as if it had itself sued and recovered." *Dewing* vs. *Perdicaries*, 96 U. S., 193; *Foss* vs. *Harbottle*, 2 Hare, 461.

In England, actions by stockholders on behalf of corporations were originally not at all favored. In *Foss* vs. *Harbottle*, 2 Hare, 461, 492 (1843), a rule was formulated, which for a long time was reiterated both in this country and in England, to prevent a suit by a shareholder to enjoin a threatened wrong in the management of the company or to redress a completed one, on the theory that wrongful management of a corporation is in legal contemplation, a wrong against the company only and as such not remediable except through the corporation. The only remedy of a shareholder was there held to be an appeal to a shareholders' meeting. While the shareholders' meeting was theoretically sufficient, practically it was found that the shareholders' meeting was not, and that while theoretically the wrong was solely to the corporation, shareholders were in fact injured. Various efforts were accordingly made to avoid the rigor of the *Foss* vs. *Harbottle* rule. The first expedient, attempted mostly in England, was for the dissatisfied shareholders to sue in the name of the corporation to redress the wrong. The difficulty with such course, however, lay in the ability of the defendants, generally by the majority shareholders, to dismiss the bill on motion, as having been filed without the corporate authority, where the merits were necessarily not inquired into. Resort was then had to the expedient foreshadowed in the opinion of Vice Chancellor WIGRAM in *Foss* vs. *Harbottle*, where, although he laid down the rule prohibiting the suit in most emphatic language, he clearly indicated an exception:

> "If" said he "a case should arise *of injury to a corporation* by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that * * * the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue" (2 Hare, 261, 292).

The above quotation has since been used as a basis for jurisdiction of shareholders actions in all cases where the "claims of justice" demand, both in England where it orginated, and in this country. In *Russell* vs. *Wakefield Waterworks Company*, 20 Law Rep. Equity Cases, 474, JESSEL, *M. R.*, approved the law as laid down in *Foss* vs. *Harbottle*, *supra*, and particularly stated cases in which the exception to the rule was properly applied, *inter alia:*

> "It is not necessary that the corporation should absolutely refuse by vote at the general meeting, if it can be shown either that the wrong-doer had command of the majority of the votes, so that it would be absurd to call the meeting; or if it can be shown that there has been a general meeting substantially approving of what has been done; or if it can be shown from the acts of the corporation as a corporation, distinguished from the mere acts of the directors of it, that they have approved of what has been done, and have allowed a long time to elapse without interfering, so

that they do not intend and are not willing to sue. In all those cases the same doctrine applies, and the individual corporator may maintain the suit."

In *Alexander* vs. *Automatic Tel. Co.*, 2 Ch. Div. (1900), 56, LINDLEY, *M. R.*, so far approved of the shareholders' suit as to state, at p. 69:

> "An action in this form is far preferable to an action in the name of the Company and then a fight as to the right to use its name. But this last mode of procedure is the only other open to a minority of shareholders in cases like the present."

In *Dominion Cotton Mills Company, Limited*, vs. *Amyot*, Appeal Cases (1912), 546, at 552, quoting from *Burland* vs. *Earle*, Appeal Cases (1902), 83, it was said:

> "'Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should be *prima facie* brought by the company itself. * * * But an exception is made * * * where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is a mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress.'"

In *Atwool* vs. *Merryweather*, L. R., 5 Eq., 464 n, at p. 468, Sir W. PAGE WOOD, *V. C.*, said:

> "This bill being filed by the plaintiff on behalf of himself and the other shareholders, it is suggested that the proper course would be to file a bill on behalf of himself and the other shareholders for leave to use the name of the company, in order to set aside that contract. I do not think that circuitous course is necessary under the circumstances. * * * it would be idle to go through the circuitous course of saying that leave must be obtained to file a bill for the company, and *pro forma* have a totally different litigation."

In this country the right of the stockholder to sue in the right of the corporation, in the event of the failure on the part of the corporation to do so, was first fully admitted in *Dodge* vs. *Woolsey*, 18 How., 331, but the rule therein announced has been repeatedly explained and extended by subsequent cases and by text writers. In *Machen on Corporations* it is said, that, while that case has often been cited with approval, caution is necessary in using as authority at the present day, isolated passages from the opinion of the Court, which was delivered before the subject had been thoroughly thought out and while the law was in an embryonic condition. It is also said by Mr. Machen at page 937, §1160, that while "the whole subject is involved in some uncertainty and obscured by a vagueness which appears inevitable when the underlying principle is considered," the present rule is that a shareholder's suit can be maintained wherever "the claims of justice" demand.

In *Robinson* vs. *Smith*, 3 Pai. Ch. (N. Y.), 221, a suit for an accounting for property of a corpora-

tion misapplied by the directors, to which a demurrer was interposed because the corporation was not made a party defendant, at p. 232, it is said:

> "Generally, where there has been a waste or misapplication of the corporate funds by the officers or agents of the Company, a suit to compel them to account for such waste or misapplication, should be in the name of the corporation. But as this court never permits a wrong to go unredressed merely for the sake of form if it appeared that the directors of the corporation refused to prosecute by collusion with those who had made themselves answerable by their negligence or fraud, or if the corporation was still under the control of those who must be made the defendants in the suit, the stockholders who are the real parties in interest, would be permitted to file a bill in their own names, making the corporation a party defendant. And if the stockholders were so numerous as to render it impossible, or very inconvenient to bring them all before the Court, a part might file a bill, in behalf of themselves and all others standing in the same situation."

While in many cases where the point was not directly involved, *dicta* are found to the effect that a shareholder's suit should be brought in equity, a careful analysis discloses that those cases are all of an equitable nature or had some distinct ground of equity to support the equity jurisdiction. In the case of an action under the Sherman Act, whether by the corporation or by a shareholder because the corporation neglects to sue, there is nothing to sustain equity jurisdiction. The suggestion that equity jurisdiction might be supported on the theory of a breach of trust of the corporation to-

ward the shareholders does not fit the facts of a case under the Sherman Act or any other actionable tort or other legal cause of action, *e. g.*, ejectment, against third parties brought by a shareholder in the right of the corporation, because the corporation neglects to sue, or defended because the corporation refuses to defend. That there is a distinction between the two classes of cases was recognized by Mr. Justice WAYNE in *Dodge* vs. *Woolsey*, *supra:*

> "Yet it is to be observed, that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension, or simple negligence on the part of the directors."

It is respectfully submitted that the plaintiffs are entitled to maintain their action and assert, in behalf of the defendant United Copper Company, its rights to damages under the Sherman Act against the other defendants.

It is respectfully submitted that the demurrers on the grounds that the complaint does not state facts sufficient to constitute a cause of action, and that the cause of action cannot be maintained at law should have been overruled, and the motion for judgment on the pleadings in favor of the defendants denied, and that the judgment of the District Court should be reversed.

All of which is respectfully submitted.

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The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

Office Supreme Court, U. S.
FILED
MAY 1 1917
JAMES D. MAHER
CLERK

United States Supreme Court,

OCTOBER TERM, 1916, No. 208.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs-in-Error,

AGAINST

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, UNITED COPPER COMPANY *et al.*,
Defendants-in-Error.

Additional Citations on Behalf of Plaintiffs-in-Error.

1. Under the New York practice, a demand that a corporation bring an action, as alleged in the complaint (fols. 24–25), is a sufficient basis for a stockholder's action.

Greaves *v.* Gouge, 69 N. Y. 155.

2. The New York practice, on motions for judgment on the pleadings, pursuant to section 547 of the Code of Civil Procedure, analogous to that upon

demurrer, allows the party whose pleading has been found insufficient, to amend upon proper terms, where an amendment is appropriate.

Schleissner *v.* Goldsticker, 135 N. Y. App. Div. 435.

3. Under the New York practice, it is settled that legal and equitable questions may be disposed of in a single action.

City of New York *v.* Matthews, 213 N. Y. 563.

4. Where recovery for the results of a monopolistic conspiracy is sought under section 7 of the Sherman Act, the action survives against the estate of a decedent, in case he secured some benefit at the expense of the plaintiff; that he did so is a matter of proof, and the absence of an allegation is not a reason for striking out the executors as parties defendant.

United Copper Securities Co. *v.* Amalgamated Copper Co., 232 Fed. Rep. 574, citing the exception stated in
United States *v.* Daniel, 6 How. 11.

Respectfully submitted,

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FILED
MAR 9 1917
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Supreme Court of the United States.

OCTOBER TERM, 1916, No. 208.

(ORIGINALLY No. 579, OCTOBER TERM, 1915).

UNITED COPPER SECURITIES COMPANY and
ARTHUR P. HEINZE,
Plaintiffs in Error,

vs.

AMALGAMATED COPPER COMPANY, ANACONDA
COPPER COMPANY, ADOLPH LEWISOHN,
UNITED COPPER COMPANY ET AL.,
Defendants in Error.

BRIEF FOR AMALGAMATED COPPER COMPANY ET AL., DEFENDANTS IN ERROR.

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Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 208.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE, *Plaintiffs in Error,* vs. AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, UNITED COPPER COMPANY, ET AL., *Defendants in Error.*	Brief for Amalgamated Copper Company *et al.*, Defendants in Error.

Statement.

Error to the United States Circuit Court of Appeals, for the Second Circuit, to review a final judgment (p. 47) directed by that Court, which affirmed a final judgment of the United States District Court, for the Southern District of New York, sustaining demurrers to the complaint and dismissing the complaint (fols. 88–94). The demurrers were interposed on the ground that the complaint did not state facts sufficient to constitute a cause of action and that the plaintiffs' remedy, if any, was in equity (fol. 81).

The action was brought on the law side of the court (fols. 13–16), by the plaintiffs in error, as stockholders of the United

Copper Company and on its behalf, to recover treble damages ($15,000,000) under Section 7 of the Sherman Law, alleged to have been sustained by the United Copper Company as the result of an alleged conspiracy among the defendants to monopolize the interstate trade in copper. The United Copper Company was made a party defendant.

It is positively asserted in the brief for the plaintiffs in error (pp. 3–4), that the alleged cause of action is in favor of the United Copper Company, and that the plaintiffs in error individually have no cause of action against any of the defendants. This also appears from the complaint (fols. 65, 66, 69, 70, 71); and the judgment demanded is that the damages sustained be paid to the United Copper Company (fols. 71–2). The only connection of the plaintiffs in error with the alleged transactions was that of stockholders; and the interest of each in the total capital stock of the Company was the inconceivably small percentage of $\frac{1}{50}$ of 1%, each claiming to have 100 shares of the common stock, of the par value of $100 each, out of a total capitalization of $50,000,000 (500,000 shares), of which $5,000,000, par value, consist of preferred stock (fols. 22–4).

A demand upon the corporation to commence this or a like action is alleged to have been made; but the corporation and the board of directors refused to comply with the demand (fol. 25). *No wrongdoing or misconduct on the part of the directors or officers, or any of them, is charged or intimated.*

It is respectfully submitted that a representative action of this kind cannot be maintained at law, and that the complaint does not state facts entitling the plaintiffs in error to any relief.

POINTS.

FIRST.

A representative stockholders' suit in equity will not lie under Section 7 of the Sherman Law.

This Court has expressly held that a stockholders' suit in equity, on behalf of the corporation, will not lie under Section 7 of the Sherman Law, to recover three times the damages sustained by the corporation.

Fleischmann v. United Gas Improvement Co., 240 U. S., 27.

The plaintiffs were thus precluded from suing on behalf of the United Copper Company in equity. They have accordingly attempted to bring such an action at law.

A reference to some elementary principles in the law of corporations will make it entirely clear that a representative action by stockholders, on behalf of the corporation, can never be maintained at law. The basis of such an action is the necessity of obtaining the aid of a court of equity to prevent the consummation of a wrong against the corporation by those charged with the duty of protecting its interests.

SECOND.

Management of business corporations vested exclusively in board of directors.

I. The affairs of every business corporation are managed by its board of directors or trustees; and, in such management, the directors are dependent solely upon their

own knowledge of its business and their own judgment as to what its interests require, free from any interference by the stockholders.

Flynn v. Brooklyn City R. Co., 158 N. Y., 493, 507-8;
Beveridge v. New York El. R. Co., 112 N. Y., 1, 22;
Union Pacific R. Co. v. Railroad Company, 163 U. S., 564;
Corbus v. Gold Mining Co., 187 U. S., 465.

Even a majority of the stockholders cannot override the discretion of the directors, so long as the directors are acting in good faith, within the charter powers.

Continental Motors Co. v. Belmont, 206 N. Y., 7, 16.

II. The United Copper Company was incorporated under the laws of New Jersey (fol. 22). The Corporation Law of that State expressly confers all powers of management upon the board of directors (L. 1896, Ch. 185, Sec. 12):

> "The business of every corporation shall be managed by its directors, who shall respectively be shareholders therein."

In Plaquemines Tropical Fruit Co. v. Buck, (52 N. J. Eq., 219), the Court said (p. 238):

> "The board of directors is the legal executive, recognized as such not only in practice but on principle and by statute."

THIRD.

Directors entirely independent of stockholders when acting in good faith and within corporate powers.

I. Ordinarily, the courts have nothing to do with the internal management of business corporations; and stockholders will not be heard to complain of the decisions of the directors, so long as the directors act in good faith, within the corporate powers. Corporate elections furnish the exclusive remedies in all such cases.

Flynn v. Brooklyn City R. R. Co., 158 N. Y., 493, 507;
Benedict v. Columbus Construction Co., 49 N. J. Eq., 23;
Ellerman v. Chicago Junction Rys. Co., 49 N. J. Eq., 217;
Tuscaloosa Co. v. Cox, 68 Ala., 71;
Gamble v. Queens County Water Co., 123 N. Y., 91, 99 (opinion of PECKHAM, J.);
Siegman v. Electric Vehicle Co., 140 Fed., 117;
Corbus v. Gold Mining Co., 187 U. S., 455, 463.

In Benedict v. Columbus Construction Co., the Court said (p. 36):

> "If stockholders in a corporation disapprove of the company's management conducted without fraud or gross disabuse of trust, or consider their speculation a bad one, their remedy is to elect new officers or sell their shares or withdraw."

In Ellermann v. Chicago Junction Rys. Co., the Court said (p. 232):

> "Individual stockholders cannot question, in judicial proceedings, corporate acts of directors, if the same are within the powers of the corporation and in furtherance

of its purpose, are not unlawful or against good morals, and are done in good faith and in the exercise of an honest judgment. Questions of policy of management, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, of lawful appropriation of corporation funds, are left solely to the honest decision of the directors, if their powers are without limitation and free from restraint. To hold otherwise would be to substitute the judgment and discretion of others in the place of those determined on by the scheme of incorporation."

In Tuscaloosa Co. v. Cox, the Court said :

"To allow a dissatisfied minority to arraign the directors before the courts of the country, whenever, in the opinion of such minority, a wiser or better policy could have been pursued, would practically put an end to the benefits claimed to result from associated capital."

In Corbus v. Gold Mining Co., this Court said (p. 463) :

"The directors represent all the stockholders and are presumed to act honestly and according to their best judgment for the interests of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder, or at his instance submitted for review to a court of equity. The directors may sometimes properly waive a legal right vested in the corporation, in the belief that its best interests will be promoted by not insisting on such right. They may regard the expense of enforcing the right or the furtherance of the general business of the corporation in determining whether to waive or insist upon the right. And a court of equity may not be called upon, at the appeal of any single stockholder, to compel the directors or the corporation to enforce every right which it may possess, irrespective of other considerations. It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs."

III. In the brief for plaintiffs in error (p. 12), it is contended that the cause of action is in tort. But where the

action is to redress a tort, the question whether it is expedient for the corporation to endeavor to obtain damages is one peculiarly for the directors to determine.

4 Thompson on Corporations, Sec. 489 ;
Hawes v. Oakland, 104 U. S., 450, 457.

In Hawes v. Oakland, this court quoted with approval the following extract from the opinion of the Court, in an English case (p. 457) :

> " There may be a great many wrongs committed in a company—there may be claims against directors, there may be claims against officers, there may be claims against debtors ; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation ; and it is the company, as a company, which has to determine whether it will make anything that is a wrong to the company a subject matter of litigation, or whether it will take steps to prevent a wrong from being done."

FOURTH.

Directors as trustees.

While directors are merely the agents of the corporation in its dealings with third persons, yet, as to stockholders, they occupy a fiduciary capacity, because they owe to the stockholders the duty of conducting the business of the corporation within the limits of its charter powers and of exercising their authority in good faith and not in their own interest or in that of third persons, to the prejudice of the stockholders. To that extent, they are trustees ; and they may be called to account as such on behalf of the corporation.

2 Pomeroy, Eq. Jurisp., Secs. 88-97, 1061, 1063 ;
Morawetz on Corporations, Sec. 381 ;

Citizens' Loan Ass'n v. Lyon, 29 N. J. Eq., 110; aff'd, 30 N. J. Eq., 732;
Fougeray v. Cord, 50 N. J. Eq., 185, 199;
Robinson v. Smith, 3 Paige Ch., 222;
Jackson v. Ludeling, 21 Wall., 616;
Forbes v. Railroad Co., 2 Woods, 323 (BRADLEY, J.);
Bosworth v. Allen, 168 N. Y., 157.

In Bosworth v. Allen, the Court said (p. 165):

> "The directors of a corporation are charged with the duties of trustees and bound to care for its property and manage its affairs in good faith; and, for violation of that duty, resulting in waste of its assets, injury to its property and unlawful gain to themselves, they are liable to account in equity the same as ordinary trustees. The corporation has the right to call upon them to account."

FIFTH.

Representative suit by stockholders only where directors guilty of misconduct.

I. Before a stockholder will be allowed to bring an action on account of an injury to the corporation, he must clearly show some breach of trust on the part of the directors, resulting in substantial injury to the corporation. The courts will listen to him only where it is necessary to prevent an absolute failure of justice.

Graham v. Machine Works, 138 Ia., 456;
Slattery v. Transportation Co., 91 Mo., 217;
Grant v. Mountain Co., 93 Tenn., 700;
Hyams v. Calumet & Hecla Co., 221 Fed., 529, 542 (C. C. A.);
Hawes v. Oakland, 104 U. S., 450, 454;
Detroit v. Dean, 106 U. S., 537;
Dickerman v. Northern Trust Co., 176 U. S., 181, 188;
Corbus v. Gold Mining Co., 187 U. S., 455, 463.

In Detroit v. Dean, this Court, in considering when a single stockholder may invoke the aid of the courts to protect the rights of the corporation and thus assume duties properly devolving upon its directors, said (p. 542):

> "He must show a clear breach of duty on their part in neglecting or refusing to act in the matter, amounting to such grossly culpable conduct as would lead to irremediable loss to him if he were not permitted to bring the matter before the courts. And such neglect and refusal must not be simulated but real and persistent, after earnest efforts to overcome it."

II. The principle applicable is similar to that which is recognized in permitting the individual beneficiary of an express trust to sue on behalf of the trust estate, where the trustee has been guilty of a breach of trust.

Western Railroad Co. v. Nolan, 48 N. Y., 513, 518;
Hubbell v. Medbury, 53 N. Y., 98, 102.

SIXTH.

Representative suit must be in equity.

I. As the management of a business corporation is vested exclusively in the board of directors, and as the stockholders cannot interfere with the management in the absence of misconduct amounting to fraud on the corporation, it necessarily follows that the charge of fraud constitutes the foundation of a representative action on behalf of the corporation. A stockholder has no standing in court until he establishes that fact; and the only court that has any power to give relief in such cases of fraud is a court of equity. A representative action by stockholders is permitted only because the law is powerless to afford a remedy.

Cook on Corporations (7th Ed.), Sec. 701;
Pomeroy Eq. Jurisp. (3rd Ed.), Sec. 1095;

4 Thompson on Corporations, Secs. 4475, 4477-80, 4488-90;
Kelly v. Dolan, 233 Fed., 635, 639 (C. C. A.);
Dodge v. Woolsey, 18 How., 331, 341;
Davenport v. Dows, 18 Wall., 626;
Hawes v. Oakland, 104 U. S., 456, 460;
Detroit v. Dean, 106 U. S., 537;
Corbus v. Gold Mining Co., 187 U. S., 455, 463;
Gamble v. Queens County Water Co., 123 N. Y., 91, 99;
Mason v. Henry, 152 N. Y., 529;
Continental Securities Co. v. Belmont, 206 N. Y., 7, 13, 15;
Holmes v. Camp, 219 N. Y., 359, 366.

In Mason v. Henry, the Court said (p. 537):

> "The position of a stockholder or policyholder, in proceeding against the directors or trustees of a corporation, would be quite different (from that of a Receiver) with respect to the form of remedy. *He could not sue at law, but must sue in equity. His right of action is purely of an equitable character.* Where directors or trustees, who are the corporate agents in the transaction of the corporate business, have committed the wrongful or illegal acts from which injury will accrue, or has accrued, to the corporate property and assets, a court of equity will entertain jurisdiction of a suit by a stockholder, or policyholder, in his own name, to obtain that relief which the corporation might have sued for itself."

In Holmes v. Camp, the Court, after referring to the wrong done to the corporation and the inability of the plaintiff stockholders to obtain action by the directors charged with misconduct, said (p. 366):

> "Those facts constituted the substance of a well recognized cause of action, *which falls within the equitable jurisdiction of our courts.*"

II. In adopting Equity Rule 94 (now 27), this Court

definitely recognized that stockholders attempting to sue on behalf of a corporation must necessarily proceed in equity.

III. In all representative suits of stockholders, the corporation is a necessary party defendant, in order that the decree may be binding upon it.

Davenport v. Dows, 18 Wall., 626;
Porter v. Sabin, 149 U. S., 473, 478;
Flynn v. Brooklyn R. R. Co., 158 N. Y., 493, 508.

If the action were at law, the corporation would not be a proper party, as no liability of the corporation to the plaintiffs (who, for the time being, are the corporation), could possibly be asserted. A corporation cannot sue itself for a duty to itself.

SEVENTH.

No decisions in support of plaintiffs' contention.

Counsel for the plaintiffs in error have been unable, in their brief, to point to a single decision in the United States or England, where the court decided, after consideration of the question, that a representative action at law might be maintained. They content themselves with *dicta*, or with references to cases where the point was not raised or considered.

I. The decision of the Supreme Court of Minnesota (Morrill v. Little Falls Co., 46 Minn., 260), was especially relied upon in the Court below; and the Circuit Court of Appeals, in its opinion, thought that the Minnesota case did sustain the plaintiffs' contention (Record, p. 46).

The point was not considered or involved in that case, as the defense was in equity, for strictly equitable relief. The

action was brought to determine an adverse claim to real property, in which a corporation was made a party defendant because it claimed some interest in the property. It was brought by an individual in his own interest, claiming title to all of the land in question. The plaintiff was the president of the corporation; and he made various persons, including the corporation, parties defendant. He caused the summons to be served upon the corporation by having it served upon himself as president. The corporation made default; and two of the individual defendants, who were also stockholders, appeared, after the default of the corporation, and filed an answer on their own behalf and on that of the corporation. Subsequently, they applied for leave to serve an amended answer; and this was denied as to the corporation, because its default had not been sufficiently excused. They then filed an amended answer, alleging that the plaintiff had obtained title to the land in question by various fraudulent acts, in an attempt to deprive the corporation of all its property except its franchise. The relief prayed for was that the various deeds which had been executed to the plaintiff pursuant to this fraudulent conspiracy should be declared null and void and that the property be decreed to be that of the corporation.

Upon this answer, the Court directed judgment on the pleadings in favor of the plaintiff. Upon appeal, the Supreme Court of the State held that, as the fraud was conceded by the motion for judgment and as the facts showed that the corporation was under the control of the parties who had been guilty of the fraud, the defendants, as stockholders, had the right to interpose the defense.

It will be seen that this defense was strictly an equitable one, which the statutes of Minnesota, like those of many other States that have adopted the New York practice, permit to be interposed in an action at law.

2 Stats. Minn. (1891), Secs. 4685, 4739, 4771.

Section 4685 is as follows :

> "SEC. 4685. *One form.* The distinction between actions at law and suits in equity and the forms of all such actions and suits are abolished; and there shall be in this state but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil action."

Section 4739 permits the plaintiff to unite several causes of action, whether legal or equitable, in the same complaint; and Section 4771 authorizes the defendant to plead "all equities existing at the time of the commencement of any action" in his favor.

The relief in that case was so clearly equitable that it could not have been given in an action at law; and the Court itself referred to this in its opinion, in considering when a stockholder will be permitted to represent the corporation (p. 266) :

> "It proceeds upon the principle that whatever is or may be inimical or injurious to the corporation is or may be an injury to the stockholder, and he is therefore entitled *to equitable relief.*"

And again (p. 266) :

> "Good faith then towards the stockholders demanded of all who pretended to act for the corporation an honest effort to protect its rights, and the failure on his (the president's) part might justify *equitable* interference."

The only possible pretext for referring to that case as an authority to sustain the contention of the plaintiffs in error is in the *dictum* which is quoted in their brief (p. 14), that "a stockholder may sue both at law and in equity in his own name, in behalf of the company's interest, where it cannot or will not do so in its corporate capacity".

Before making this statement, the Court had quoted from Hawes v. Oakland (104 U. S., 450, 460) and Baldwin v.

Canfield (26 Minn., 43), both of which were in equity; and the statement relied upon was evidently made carelessly and inadvertently, as the subsequent remarks of the Court, quoted above, clearly indicate. It is possible, too, that the Court intended to convey its impression that a cause of action in favor of a corporation, whether legal or equitable, might be enforced by a stockholder, in equity.

II. The only other authority cited, where a representative action was tried as an action at law, is Sheridan v. Electric Light Co. (38 Hun, 396), a decision of two Justices of the old General Term of the Supreme Court of New York, an intermediate court of appeal. That was an action by a stockholder, on behalf of the corporation, to recover moneys which had been misappropriated by two of the defendants, with the aid of some of the officers of the company, who were also made defendants. In New York, the distinction between legal and equitable forms of action was abolished in 1848 (L. 1848, Ch. 379, Sec. 62). The complaint showed an equitable cause of action; but the plaintiff apparently placed the cause on the calendar for jury trials, and the defendants raised no objection to that mode of trial. Although tried by a jury, the appellate court recognized the equitable character of the action; for, as the Court below in the present case (Record, p. 46) pointed out, the Justice who wrote the opinion in that case expressly called attention to the fact that the right of the stockholder to sue on behalf of the corporation is in equity.

EIGHTH.

Representative action will not lie to enforce a mere legal claim.

From the foregoing well settled principles, it is evident that a stockholders' suit on behalf of the corporation will not

lie to enforce a claim at law in favor of the corporation, where the directors are not charged with fraudulent neglect or misconduct. To repeat what this Court said, in Hawes v. Oakland (p. 457) :

> "There may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation ; and it is the company, as a company, which has to determine whether it will make anything that is a wrong to the company the subject matter of litigation."

If, in the judgment of the directors, a disputed claim in favor of the corporation, either on contract or in tort, should not be prosecuted, the stockholder is concluded by the decision of his duly constituted representatives. If he is not satisfied with their decision, his only remedy is to exercise his influence in the election of other directors who will do so. It would be only where the directors, in failing to enforce a legal claim, were guilty of such bad faith that their act would constitute a waste of the corporate property, that a representative suit would lie on behalf of the corporation; and, in that case, the directors would be personally liable to account to the corporation for the waste committed. A representative action by a stockholder to enforce, in an action at law, an alleged claim on contract or in tort, on the ground of waste of corporate assets, would never need to be brought by the stockholder; the directors could always be directly held for the consequences of their misconduct.

NINTH.

Plaintiffs in error recognize that remedy is in equity.

The plaintiffs in error have, in the present case, recognized the equitable character of this suit, by making the

United Copper Company, on whose behalf the action is brought, a party defendant, and by a feeble attempt to bring themselves within the requirements of Equity Rule 27, by alleging a demand upon the corporation to bring the action and the refusal of the corporation to comply with their demand (fols. 24–5).

TENTH.

Special considerations in the present case.

The present case furnishes an impressive illustration of the fundamental reasons why a representative action, at law, will not be entertained by the courts.

I. Equity Rule 27 requires the bill of complaint to show that the plaintiff was a shareholder at the time of the transactions complained of, or that his share devolved upon him subsequently by operation of law.

One of the plaintiffs in error, the United Copper Securities Company (a South Dakota corporation), alleges in the complaint that it has been the owner of 100 shares of stock since January, 1912 (fols. 23–4). But the wrongful acts complained of occurred years before, dating back to an alleged conspiracy entered into in 1897 (fols. 33–4), fifteen years previously, and five years prior to the incorporation even of the United Copper Company (fol. 41), and culminating in the sale to the defendants of substantially all the properties owned or controlled by the United Copper Company (fol. 59) and the destruction of the business of that Company (fols. 53–6); and all this had been accomplished by July 1, 1906 (fol. 68). The present action was commenced on May 3, 1912 (fols. 10, 16). Thus, we have the case of a corporation of a distant western State, holding an

infinitesimal fraction ($\frac{1}{5}$ of 1%) of the stock of a large eastern corporation, which it had acquired just before bringing the action and apparently for the sole purpose of bringing it, attempting to prosecute an action at law in the interest of the corporation to recover damages for an alleged tort, which the directors of the corporation, *whose good faith is not questioned*, had not considered it advisable to prosecute. In other words, the board of directors of a small holding corporation, by purchasing an insignificant interest in the capital stocks of the great corporations of the country, may largely control the business policy and internal management of such corporations.

Inasmuch as the sale of substantially all of the property of the United Copper Company is alleged to have been made prior to July, 1906, it is reasonable to assume that the transaction was formally approved by a majority of the stockholders of that Company. At any rate, the transaction received such approval by acquiescence.

II. It is conceded by the plaintiffs in error (Brief, p. 74), that they did not sustain any injuries which were not common to all the stockholders. Manifestly, the United Copper Securities Company could not have sustained any such injuries, as it did not acquire its stock until long after the date of the alleged wrongs; and if what the plaintiffs allege in their complaint is true, the stock at that time had only a nominal value and, consequently, cost the United States Securities Company only a nominal sum. The plaintiffs in error thus expressly recognize the well settled principle, that a stockholder cannot individually maintain an action to recover consequential damages to himself as a stockholder as the result of injuries to the corporation, for the reason that such injuries affect all the stockholders alike and can be redressed only by the corporation itself, or some one on its behalf.

Niles v. N. Y. Cent. etc., R. R. Co., 176 N. Y., 119;
Howe v. N. Y., N. H. & H. R. R. Co., 142 App. Div., 451;

Smith v. Hurd, 12 Metc., 371;
Converse v. United Shoe Machinery Co., 185 Mass., 422;
Ames v. Am. Tel. & Tel. Co., 166 Fed., 820;
Loeb v. Eastman Kodak Co., 183 Fed., 704, 708-9 (C. C. A.).

It is only where the injury to the corporation also results in special injury to the particular stockholder that he can maintain a separate action. The principle involved is similar to that which is applied in the case of a public nuisance, were an individual cannot maintain an action unless he shows special injury different from that which has been sustained by the community at large.

Roosevelt v. Draper, 23 N. Y., 18;
Francis v. Schoelkopf, 53 N. Y., 153, 154;
Campbell v. Seaman, 63 N. Y., 568.

III. To permit minority stockholders to bring actions at law on behalf of the corporation, to recover alleged damages for torts which the board of directors had seen fit to disregard, would result in flooding the courts with vexatious and unfounded litigation and in repudiating the principle of representative government in corporate management.

The conduct of business by large corporations would become impossible, if it was subject to the whims or sinister designs of ignorant or unscrupulous stockholders. If one stockholder can maintain an action at law on behalf of the corporation, without charging bad faith or misconduct of any kind in the management, on the mere refusal of the board of directors to comply with his wishes, then all the stockholders throughout the country must have such right. The great railroad and industrial corporations have thousands of stockholders, residing in every State of the Union. On the contention of the plaintiffs in error, a stockholder of a Maine corporation, who resided in California, might maintain an action at law in that State to prosecute an alleged claim in tort which the

directors in Maine, familiar with all the facts, had decided not to prosecute, and it is conceivable that an action for the same alleged cause might be brought at the same time in many different States. Such a condition of affairs will not be tolerated by the courts.

Loeb v. Eastman Kodak Co., 183 Fed., 704 (C. C. A.).

ELEVENTH.

No cause of action pleaded.

In every representative action, two fundamental facts must be pleaded and proved : a cause of action in favor of the corporation, and the facts which entitle the plaintiff to maintain the action in place of the corporation.

Continental Securities Co. v. Belmont, 206 N. Y., 7.

I. No reason for the intervention of the plaintiffs on behalf of the United Copper Company is shown in the present case, unless a mere naked demand by a single stockholder, and refusal by the directors to comply with the demand, have the effect of depriving the directors of all discretion in the management of the affairs of the corporation.

II. The only conclusion to be drawn from the allegations of the complaint is that the United Copper Company itself was merely a holding company, not engaged in commerce or active business, and was injured merely in its capacity as stockholder in common with all the other stockholders of the various companies that were so engaged. The alleged injuries were thus inflicted upon the other companies, whose stock was held by the United Copper Company, and not upon that Company itself.

This is the conclusion which counsel for the plaintiffs in error, in their brief, draw from the allegations of their own complaint, when they say, in giving a summary of the complaint (Brief, p. 5):

> " That said corporation was organized *to acquire the stock* of the Montana Ore Purchasing Company, the Nipper Consolidated Copper and Silver Mining Company, the Corra Rock Island Mining Company, the Minnie Healy Mining Company and the Belmont Mining Company, which were mining and trading companies dealing in copper in interstate commerce, and, *through such stock ownerehip, to continue the business of said companies;* that said corporation did acquire the stock of said companies and did endeavor *to continue the said business of said companies* " (fols. 41, 42).

III. It is nowhere alleged in the complaint that the United Copper Company was itself an operating company, or that it operated any copper mines or was engaged in marketing any copper. There are insinuations to this effect, but no direct assertions; while the positive allegations make it perfectly clear that all the injuries alleged to have been sustained were inflicted upon the operating companies whose stock was owned by the United Copper Company.

An example of such insinuations is found in the allegation that the defendants endeavored to discredit the United Copper Company and the companies acquired by it, and to impair their ability to compete freely with the defendant companies (fols. 53-4), or to acquire " additional " mining properties, and thereby unduly restrain interstate trade and commerce in copper (fol. 55), and that, by reason of such acts, the United Copper Company was greatly injured and was put to enormous expense in protecting the properties " belonging to it *and* the companies organized and financed by said Heinzes and acquired by it as aforesaid " (fol. 57). In the end, the defendants finally unlawfully procured a sale to them " of the copper mines in the State of Montana belonging

o the United Copper Company *and* said companies organized nd financed by said Heinzes *and acquired by the United Cop-per Company as hereinbefore set forth*, with the exception of the La France Copper Company " (fol. 59).

That this insinuation of ownership of mining properties by the United Copper Company had no basis in fact, is evident from the positive allegations in the complaint.

1. The various companies engaged in mining and shipping copper in Montana prior to 1902 are enumerated in Article XIII of the complaint (fols. 31-3). In 1902, the United Copper Company was organized and *acquired the stock* of the group of mining and trading companies (including the Montana Ore Purchasing Company) which had been organized and financed " by the said Heinzes " (fol. 41).

That it was only from the stock ownership of such corporations that the United Copper Company could in any sense be said to be engaged in the business of mining and shipping copper is expressly alleged (fol. 41) :

> " and *through its said stock ownership* (the United Copper Company), endeavored to continue the business of said Montana Ore Purchasing Company and said other mining and trading companies, *and through said operating companies* to compete with the corporations controlled by said Rogers and the individual defendants as aforesaid, in dealing in copper in interstate commerce".

2. As part of the unlawful conspiracy, it is alleged that malicious suits and actions were commenced in the courts ; but all of these are alleged to have been " against the mining and trading companies organized and financed by said Heinzes and acquired by said defendant United Copper Company, *as aforesaid*" (fol. 44) ; and although the pleader again endeavors to create the impression that such suits were also brought against the United Copper Company (fol. 44) upon the acquisition of " new " properties by it *or* by companies acquired by it (fol. 46), it is evident that they were brought only against the mining companies whose stock it owned. The principal example given of such malicious litigation is in a suit brought in February, 1899 (three years before the incorporation of the United Copper Company) against the Montana Ore Purchasing Company ; and more than a page of the complaint is

occupied with a description of that litigation, in which it is intimated that the Courts in Montana were also parties to the alleged conspiracy (fols. 48–51). Additional acts by the defendants are then alleged, "to exclude the United Copper Company from engaging, *through the mining and trading companies acquired by it as aforesaid*, in the interstate trade and commerce in copper aforesaid" (fol. 52).

3. In complaining of the sale of the various properties to the defendants, the pleader again reveals the real fact, in alleging that all disputes between the Amalgamated Copper Company and its allied companies, on the one hand, "*and the companies which owned the United Copper Company properties transferred as aforesaid*" (fol. 60), were thereupon settled.

IV. From the foregoing, it is very obvious that the only business in which the United Copper Company was engaged was in acquiring the stocks of mining and trading companies. In other words, its only interest was that of a stockholder of companies whose properties are alleged to have been injured by the wrongful acts of the defendants. Therefore, from the positive allegations contained in the complaint, not even the company on whose behalf the present action was brought had any standing to sue for the alleged injuries sustained by the corporations whose stock it held. The injuries, if any, could be redressed only by those companies themselves, or by stockholders suing on their behalf, respectively (*ante*, p. 17).

TWELFTH.

Evidences of bad faith in bringing the present action.

That this action could not have been brought in good faith, to enforce an alleged right which the United Copper Company itself deliberately declined to enforce, is evident

from what has already been said. The only motive for bringing the action would, therefore, appear to have been an improper one, to gain some personal advantage. That this view of the case is not an uncharitable one, is supported by certain unmistakable indications, which are revealed by the form of the action, the persons who have been made parties to it and the express allegations of the complaint.

I. In failing to bring a suit in equity, the plaintiffs in error necessarily concede that they have no ground for equitable relief, and, consequently, no right to attempt to enforce a claim which the directors, in the exercise of their undoubted discretion, declined to prosecute; and the good faith of the directors is not in any way questioned. The plaintiffs stand on a mere naked demand and refusal.

II. The infinitesimal interest of the plaintiffs in error in any possible recovery for the corporation did not justify their going to the expense of this action.

III. The fact that the plaintiff in error, the United Copper Securities Company, a South Dakota corporation, acquired a hundred shares of the common stock of the United Copper Company, just before the commencement of this action and years after the acts complained of, and that the complaint was verified by it through Arthur P. Heinze, the other plaintiff in error, who describes himself as "an officer and agent" of the said Company (fols. 73-4), is strongly suggestive of control by "the said Heinzes," a phrase constantly recurring in the complaint (fols. 32-3, 41, 43, 44, 46, 47, 49, 52, 53, 55, 57, 58).

IV. Who "the said Heinzes" were is definitely asserted in the complaint: they were Arthur P. Heinze (one of the plaintiffs in error) and F. Augustus Heinze (fol. 29). It appears from the complaint that it was this same Arthur P.

Heinze, who, with F. Augustus Heinze, organized and controlled the various Companies, including the United Copper Company, which are alleged to have been injured by the acts of the defendants. It is, therefore, a reasonable presumption that "the said Heinzes", including the plaintiff in error, Arthur P. Heinze, were directors and officers of the United Copper Company and were the very persons who made the sales of the properties of the various Companies to the defendant, and who, upon the demand of these plaintiffs in error, refused to have the corporation bring an action to obtain redress for the alleged wrongs done by the defendants. In other words, these plaintiffs in error are attempting to do something in their own interest which "the said Heinzes" declined to permit the corporation controlled by them to do for itself; and Arthur P. Heinze, as an individual, is a plaintiff in the action on behalf of the corporation, which, as an officer of that corporation, he declined to institute!

V. The sinister character of the action is very distinctly suggested in the fact that the executors of the estate of Leonard Lewisohn, deceased, are made parties defendant. Mr. Lewisohn died on March 5, 1902 (fol. 27), before even the United Copper Company had been organized (April 28, 1902, fol. 41), and twelve years before the plaintiff in error, the United Copper Securities Company, was organized. No acts of Mr. Lewisohn could, therefore, have injured either Company in its business or property; and there is no reasonable explanation for making the executors of his estate parties to this action, except to prevent the settlement of the estate by raising a question as to its liability for $15,000,000.

What has been said in regard to Mr. Lewisohn's estate is applicable, in some measure, to the fact that the executors of the estate of Mr. Rogers are also parties defendant, although Mr. Rogers died in May, 1909 (fol. 28), three years before the United Copper Securities Company was organized.

VI. The defendants are charged with having caused numerous actions to be commenced fraudulently against the various "Heinze" Companies, based upon alleged unfounded claims to mining rights, in which injunctions were obtained and the defendants were required to file bonds in "colossal sums" (fols. 49–50).

The plaintiffs in error have not dared to charge expressly that the courts were corrupt and were controlled by the defendants. But that is a necessary implication from what they have charged against the defendants; for, unless the courts were corrupt, the number or size of the bonds required to be given in the course of regular judicial proceedings can be no evidence of wrongdoing by anyone. Therefore, these infamous charges against the defendants are baseless and must have been made for ulterior purposes. To such desperate extremities these plaintiffs in error were driven in their efforts to formulate some charges of wrongdoing against the defendants.

THIRTEENTH.

The judgment should be affirmed, with costs.

Washington, March 5, 1917.

JOHN A. GARVER,
Counsel for the Amalgamated Copper Company,
et al., Defendants in error.

Office Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1916.

No. 208.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs-in-Error,

against

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, and others,
Defendants-in-Error.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

POINTS FOR DEFENDANT ADOLPH LEWISOHN.

LOUIS MARSHALL,
Of Counsel.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

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Supreme Court of the United States,

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UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
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against

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, and others,
Defendants in Error.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Points for Defendant Adolph Lewisohn.

History of the Action.

This action was brought on May 3, 1912, by the two plaintiffs in error, suing in their own behalf and in behalf of all other stockholders of the United Copper Company, of which they claim to be stockholders (*Rec. fol. 10*), under Section 7 of the Sherman Act, to recover three-fold the damages which the United Copper Company is al-

leged to have sustained by acts of the several defendants other than that Company and which are charged to have been in violation of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." (*26 Statutes 202.*) The action was commenced by the service of "*a summons at law*" on May 3, 1912 (*Rec. fols. 13 to 18*).

The second amended complaint clearly shows the action to be one at law to recover treble the damages claimed to have been sustained, not by the plaintiff but by the United Copper Company, and which are alleged to amount to $5,000,000. The prayer for relief is for a money judgment.

The defendants demurred to the complaint as amended, on the ground that it does not state facts sufficient to constitute a cause of action (*Rec. fols. 76-81*). The demurrer was sustained by Hon. E. Henry Lacombe, Circuit Judge, and a judgment dismissing the complaint was duly rendered on September 24, 1914 (*Rec. fols. 82-95*).

The plaintiffs thereupon petitioned for the allowance of a writ of error to review this judgment by the United States Circuit Court of Appeals for the Second Circuit (*Rec. fols. 97-102*), the writ of error was allowed and issued (*Rec. fols. 4-6*), the assignment in error filed being, in substance, that the District Court erred in sustaining the demurrers and in directing that the complaint be dismissed (*Rec. fols. 109-114*). The judgment was affirmed (*223 Fed. Rep. 421*) on April 23, 1915, and now comes here on writ of error (*Rec. pp. 47 to 50*).

The plaintiffs contended in the court below, as they do here (*Brief for Plaintiffs in Error, pp. 9,*

10), that this action is one at law and not in equity, and the case was disposed of on the basis of that contention (*Rec. fols. 122-125*).

The Plaintiffs' Status.

The only allegations in the complaint relating to the status of the plaintiffs, other than those affecting their citizenship, are contained in paragraphs II, III, IV and V (*Rec. fols. 22-26*). In paragraph II it is stated that the United Copper Company had and has an outstanding common capital stock of $45,000,000 and outstanding preferred capital stock of $5,000,000. In paragraph III it is claimed that the plaintiff Arthur P. Heinze has, since May, 1902, been the lawful owner of upwards of 100 shares of the common capital stock of the United Copper Company of the par value of $100 each, and that the plaintiff United Copper Securities Company, *has since January, 1912*, been the lawful owner of upwards of 100 shares of the common capital stock of that company. In paragraph IV it is alleged:

"In or about the month of January, 1912, and before the commencement of this action, the plaintiffs, United Copper Securities Company and Arthur P. Heinze, each made a demand upon the defendant United Copper Company that this or a like action be instituted by such corporation defendant, and said corporation defendant and its Board of Directors have refused to comply with said demand, and have failed and refused to commence or cause to be commenced any action whatever in compliance therewith" (*fols. 24, 25*).

In paragraph XII (*fols. 30, 31*) referring to the conspiracies which are the basis of this action

and are presently referred to it is stated that they "were in part accomplished in 1906, 1907, 1908, 1911, and in fact up to the time of the making of the demand set forth in paragraph IV hereof."

In paragraph V it is alleged:

"This action is commenced and prosecuted by the plaintiff United Copper Securities Company, and by the plaintiff Arthur P. Heinze, each individually and for himself and also on his own behalf and on behalf of all the other stockholders of said United States Copper Company" (*fol. 25*).

The Substantial Allegations of the Complaint.

In paragraphs XII and XIII it is alleged that from 1892 copper was a product of the mines of Montana, extensively mined and dealt in as interstate commerce by the Anaconda Copper Mining Company, its predecessors, and various corporations organized and controlled by the testators of the defendant executors and the individual defendants, in competition with other corporations organized and financed by Arthur P. Heinze and F. Augustus Heinze, and that prior to the incorporation of the Amalgamated Copper Company there were various copper mining and trading corporations, which are enumerated, including the Nipper Consolidated Copper Mining Company, the Corra Rock Island Mining Company, the Minnie Healy Mining Company, the Belmont Mining Company and the Montana Ore Purchasing Company "organized and financed by the Heinzes," engaged in the mining and shipping of copper as interstate commerce, including the Montana Ore Purchasing Company organized and financed by

the Heinzes, and that these companies were actually engaged in competition (*Rec. pp. 10, 11*).

In paragraphs XIV, XV and XVI it is charged that various of the defendants, including Henry H. Rogers since deceased, wrongfully and maliciously entered into a combination and conspiracy to form a monoply in the interstate commerce of copper and in pursuance thereof procured the Amalgamated Copper Company to be incorporated and "set about to form a copper trust and to exclude all participation in interstate trade and commerce in copper which theretofore existed" (*Rec. pp. 11-14*).

In paragraph XVII it is alleged, that on April 28, 1902, the defendant United Copper Company was incorporated and duly acquired the stock of the Montana Ore Purchasing Company and of the other copper mining and trading companies "which the Heinzes had organized and financed, and through its said stock ownership endeavored to continue the business of the Montana Ore Purchasing Company and said other mining and trading companies, and through said operating companies to compete with the corporations controlled by" the individual defendants in dealing in copper and in interstate commerce (*Rec. p. 14*).

In paragraph XVIII it is charged:

"After the incorporation of the said defendant *United Copper Company*, the unfair, unlawful, improper, wrongful and malicious acts and practices aforesaid of said Rogers, and said defendants in conspiracy and combination were continued, *and directed against the United Copper Company and against the other companies organized and financed by said Heinzes and acquired by the United Copper Company as aforesaid, and their stockholders and officers and said Heinzes.*" (*Rec. pp. 14, 15.*)

In paragraphs XIX and XX there are enumerated alleged wrongful, unlawful and malicious acts done in combination and conspiracy for the purpose aforesaid, which include the wrongful and malicious institution of numerous and malicious suits, actions and legal proceedings against the mining and trading companies organized and financed by the Heinzes and acquired by the *United Copper Company*, and against the *United Copper Company* after its incorporation; the unlawful and malicious attack upon the credit and standing throughout the financial world of the *United Copper Company* and of the companies acquired by it, and their stockholders and officers; the unlawful and malicious attempt to discredit the *United Copper Company* and the companies acquired by it and their stockholders and officers and the Heinzes; the causing of the erroneous public impression that the properties of the *United Copper Company* and the companies acquired by it were utterly worthless; the attempt to impair the ability of the *United Copper Company* and of the companies acquired by it to compete freely with the defendants Amalgamated Copper Company and the Anaconda Copper Company and with other companies controlled by the defendants; and the impairment of the ability of the *United Copper Company* and of the companies acquired by it to acquire additional mining properties in the Butte Mining District (*Rec. pp. 15-19*).

Paragraph XXI sets forth:

"By reason of the aforesaid unfair, improper, wrongful, unlawful and malicious practices and methods of the said defendants and said Rogers, and their attempts to monopolize and restrain interstate commerce and trade in copper, and their

unlawful conspiracies and combinations, *the defendant United Copper Company was greatly damaged and injured*, and the annual profits reduced annually from the time of its incorporation above set forth to the 1st day of July, 1906, to an extent of not less than $1,000,000 per year, and during all of said period it was put to enormous unnecessary expenditures for the protection of the copper properties belonging to it and the companies organized and financed by said Heinzes and acquired by it as aforesaid, both above ground and under ground."

In paragraph XXII the complainant states that from the time of the incorporation of the *United Copper Company*, until on or about July 1, 1906, the defendants, other than the United Copper Company and the defendant executors, circulated the report that they would not desist in their warfare against the *United Copper Company* and the companies organized and financed by said Heinzes and acquired by the United Copper Company until their utter destruction had been accomplished, and that said defendants finally by the aforesaid unlawful, wrongful and malicious means, unlawfully procured a sale to them or interests allied with them, for their benefit, of the copper mines in the State of Montana belonging to the *United Copper Company* and the companies organized and financed by the Heinzes and acquired by the United Copper Company, with one exception, at a price far below the value thereof and not in excess of thirty per cent. of such value. (*Rec. pp. 12-21.*)

Paragraphs XXIII and XXIV then follow:

"XXIII.—By reason of the aforesaid unlawful practices and attempts of said Rogers and said defendants to monopolize and restrain interstate

commerce and trade in copper, the copper properties owned by the *United Copper Company* and in which it is and was interested, and its business in copper and copper properties was destroyed, and the said copper properties were greatly depreciated in value by reason of the inability of the *United Copper Company* to work the same and increase the output of copper ore and commercial copper in competition with the companies controlled by said Rogers and the defendants aforesaid, and the credit and financial standing of the *United Copper Company* was impaired and destroyed and the operations of the mines owned and controlled by the *United Copper Company* and in which it was interested as above set forth, were curtailed and abandoned, and the said defendants thereupon succeeded in their attempts to monopolize the entire interstate trade and commerce in copper which was a product of the mines of the State of Montana, and still control and monopolize the same, thereby preventing the operation of any competing mines and companies, to the great detriment of the *United Copper Company* and of the public, and contrary to the provisions of the statute in such case made and provided." (*Rec. pp. 21, 22.*)

"XXIV.—All of the aforesaid unlawful and wrongful acts and practices of the said defendants and the testators of the defendant executors during the lifetime of the said testators, were done and performed with the intent and for the purpose of monopolizing the interstate commerce and trade in copper, which was a product of the mines of the State of Montana, and in order to render it difficult, unprofitable and impossible for the *United Copper Company* to continue in competition as hereinbefore set forth with the defendant corporations other than the United Copper Company, and with the corporations controlled by the defendants other than the defendant executors, as aforesaid, in the interstate commerce in copper aforesaid" (*Rec. pp. 22, 23.*)

These acts are charged to have been in violation of the Act of Congress of July 2, 1890, 26 Statutes, 202. (*Rec. p. 23.*)

Paragraph XXV charges:

"On or about the 1st day of July, 1906, said Rogers and the defendants aforesaid, had secured the substantial control and monopoly of the interstate and foreign trade and commerce in the copper products of the State of Montana * * * and had prevented the defendant *United Copper Company* and the companies organized and financed by the said Heinzes and acquired by the defendant United Copper Company as aforesaid, from continuing in competition as theretofore and had damaged and injured the *United Copper Company* in its business and in its property. Since said date said Rogers during his lifetime and the said defendants maintained and increased the control and monopoly of said trade and commerce and continued to injure said *United Copper Company* as aforesaid."

Paragraph XXVI reads:

"By reason of the premises and the aforesaid unlawful combinations and conspiracy, and the acts of the aforesaid testators and of the defendants other than the defendant United Copper Company and the defendant executors, done in pursuance thereof and to carry the same into effect, the *United Copper Company* has been damaged and injured in its business and property and has sustained damages in excess of $5,000,000."

The complaint then concludes with the following prayer for relief:

"Wherefore the plaintiffs demand judgment in their favor and in favor of all stockholders of the *United Copper Company* who may join with them in the prosecution of this action in the sum of

three-fold damages under Section 7 of the Act of Congress aforesaid, and that each of the defendants shall be compelled to pay the damages sustained by the *United Copper Company* as hereinbefore alleged."

Plaintiffs' Concession as to Nature of the Action.

It is now frankly admitted by plaintiffs in error in their argument in this Court (*Brief, pp. 3 and 4*):

"*The action is brought by shareholders of the United Copper Company, upon a cause of action vested in the defendant United Copper Company to enforce on behalf of that corporation a claim of that corporation against persons and corporations, engaged in a conspiracy against it, in restraint of interstate trade and commerce, in violation of the Sherman Act, which culminated in damages to business and property of the said United Copper Company.*"

"*There is no allegation in the complaint that would give to the plaintiffs individually and for themselves only a cause of action against any of the defendants, it not being alleged that the acts complained of have caused any direct injury to the plaintiffs or depreciated the value of the stock held by them, other than as stockholders in the corporation.*"

We contend that the complaint does not set forth any cause of action which can be maintained either at law or in equity. For the purposes of this case it is sufficient, however, if we confine ourselves principally to a discussion of the plaintiffs' right to maintain this action on the theory on which it has been brought—as one at law.

POINTS.

I.

The complaint fails to set forth any facts which would justify the maintenance of this action by the plaintiffs, the alleged injury claimed to have been suffered being one inflicted upon the United Copper Company and not against them.

Stripped of all verbiage, the allegations of the complaint merely amount to this, 1, that the defendants other than the United Copper Company, desiring to injure that Company, which by virtue of its ownership of the stock and consequent control of other corporations which were defendants' competitors in the business of mining and selling copper in the State of Montana, entered into a combination and conspiracy, for the purpose of accomplishing the undue and unlawful restraint of interstate trade and commerce in copper and of destroying the competition theretofore existing; 2, that to accomplish that purpose pursuant to such combination and conspiracy, they committed a number of wrongful, malicious and unlawful acts, and employed a number of wrongful, malicious and unlawful means, in consequence of which the United Copper Company was through its stock ownership in the competing companies greatly damaged and injured, its annual profits reduced, its expenditures incurred for the protection of its corporate interests unnecessarily increased, and the properties of those corporations eventually sold for less than their full value (*Rec., fols. 56 to 63*).

Assuming that these allegations give rise to a cause of action, it must necessarily be one exclusively in favor of the United Copper Company, for which, on the assumption of the sufficiency of the allegations, an action to recover treble damages might be maintained by it under Section 7 of the Sherman Act. But this action is not brought by the United Copper Company, or by its receiver or its trustee or its assignee. It is instituted by two of its stockholders, owning $20,000 par value of its capital stock out of an aggregate of $50,000,000. They concede that no legal wrong has been inflicted upon them, that they have sustained no legal damage in consequence of any of the acts which they plead and that individually they have no cause of action.

In the face of this concession and of the framework of the complaint, taken in its entirety, the allegation that the action is commenced and prosecuted by the plaintiffs "each individually and for himself, and also on his own behalf and on behalf of all the other stockholders of said United Copper Company," is meaningless. At all events it does not change the essential character of the action. The complaint shows and the plaintiffs in error concede that the cause of action sued upon is one vested exclusively in the United Copper Company. No legal theory is set forth which justifies the plaintiffs in error or any other of the stockholders of that corporation in suing on a cause of action belonging to that company.

The principle is well settled, that a stockholder cannot maintain an action at law for damages resulting from a conspiracy to injure the corporation of which he is a stockholder. The corpora-

tion, or its receiver, alone occupies the status which will permit such an action to be maintained.

Smith v. *Hurd, 12 Metc. 371.*
Gardiner v. *Pollard, 10 Bosw. 674.*
Allen v. *Curtis, 28 Conn. 456.*
Conway v. *Halsey, 44 N. J. Law 462.*
Niles v. *N. Y. C. & H. R. R. R. Co., 176 N. Y. 119.*

In the last of these cases the plaintiff, as a stockholder of the New York & Northern Railroad Co., brought an action at law against the New York Central & Hudson River Railroad Company, which was the owner of the majority stock of the New York & Northern Railroad Company, and others, to recover damages resulting from an alleged conspiracy entered into by the majority stockholder to wreck it, by refusing, through officers under their control, to accept business. This it was charged was done in order to disable the latter company from paying the interest upon its funded debt so that a foreclosure would result by which creditors and the minority stockholders would be deprived of their interest in the property. It was held that the damages resulting from such conspiracy belonged to the corporation and not to the individual stockholders, that the latter, as such, could not maintain an action for their recovery and that such an action must be brought by the corporation or its receiver. It was further held, that even though the directors of the corporation in such a case might be controlled by the defendants, and might work against the interests of the minority stockholders, the courts had ample power to protect such interests by adequate remedies.

In *Smith* v. *Hurd*, *12 Metc. 371*, Chief Justice Shaw said, in a similar case:

"But an injury done to the stock and capital, by negligence or misfeasance, is not an injury to such separate interest [of a stockholder], but to the whole body of stockholders in common. It is like the case of a common nuisance, where one who suffers a special damage, peculiar to himself, and distinguishable in kind from that which he shares in the common injury, may maintain a special action."

In *Converse* v. *United Shoe Machinery Co.*, *185 Mass. 122*, this doctrine was reaffirmed, the Court saying:

"All the wrongs done or intended, set out in the declaration, are wrongs against the corporation in which the plaintiff is a stockholder, and except through the corporation they have no relation to the plaintiff. She was not affected by the defendant's conduct, except as every other stockholder was affected. Against her as an individual there was no conspiracy, and against her as an individual no wrong was done directly. There is no direct legal privity between her individually, or as a stockholder, and these defendants."

In *Ames* v. *American Telephone & Telegraph Co.*, *166 Fed. Rep. 820*, a declaration alleged that the Telephone, Telegraph & Cable Company of America, in which the plaintiff was a stockholder, was organized to operate an independent telephone system throughout the United States, after which the defendant company secured control of the corporation of which the plaintiff was a stockholder, by the purchase of its stock to prevent competition in the interstate telephone traffic which it had planned to carry on; that thereafter

the defendant so managed the Telephone, Telegraph & Cable Company as not to develop its business, but to prevent it from doing business, and suppress competition, until it was forced into the hands of a receiver, and that by such control the defendant had monopolized interstate telephone commerce, and thereby rendered worthless plaintiff's stock. On demurrer it was held that the declaration set forth an injury to the corporation and not to the stockholders of the Telephone, Telegraph & Cable Company, and that the plaintiff could not, therefore, sue in his own name to recover treble damages under the Sherman anti-trust act. In the course of his opinion Judge Brown said:

"The business which it is alleged was injured was that of the Telephone, Telegraph & Cable Company of America, and not of the plaintiff. Can it be said that the injury which the plaintiff has suffered by the depreciation of the value of his shares constitutes such an injury to his property that it is distinguishable from the injury to the corporation? * * *

The Sherman act does not by its terms affect the question whether an injury is in legal contemplation an injury to the corporation or an injury to the stockholder. This question must be determined upon ordinary principles of law. There can be little doubt that the ordinary principle of representation of the stockholders by the corporation is as applicable to a violation of the Sherman act as to any other violation of law. There is no indication of an intention of Congress to subject a defendant to independent suits by a multitude of stockholders for an act for which the statute affords redress to the corporation itself. The corporation has a right of action, and to so interpret the act as to confer a right of action upon the stockholder also, upon the present declar-

ation, would be in effect to subject the defendant not merely to treble damages, but to sextuple damages, for the same unlawful act."

In *Loeb* v. *Eastman Kodak Co., 183 Fed. Rep. 704*, decided by the Circuit Court of Appeals for the Third Circuit, it was held that Section 7 of the Sherman Act does not give a right of action to a stockholder or creditor of a corporation because of a combination or conspiracy alleged to have been entered into which is in violation of the act, and which it is averred had caused the bankruptcy of the corporation, resulting in the loss of plaintiff's stock or debt; that the right of action in such case is in the corporation or its trustee in bankruptcy. In the course of the opinion the Court said:

"Prior to the statute, * * * a stockholder in a corporation would have been without direct relief for an injury to his stock, through a wrong done to the corporation. The remedy for such an injury resided in the first instance solely in the corporation. By means of such a suit it could have enforced the rights and redressed the wrongs of each of its stockholders. The statute above referred to was passed, we must assume, with full knowledge of existing law in that respect. We have no reason to suppose, much less to assume, that it was intended thereby to run contrary to the settled policy of the law. Such an assumption would require us to believe that the act was intended, among other things, to multiply suits. Certainly it is not apparent that the act was intended to or did confer upon hundreds or thousands of stockholders individual rights of action when their wrongs could have been equally well and far economically redressed by a single suit in the name of the corporation. Moreover, it is manifest that the plaintiff did not receive any direct injury from the alleged illegal acts of

the defendant. No conspiracy or combination against him as a stockholder or creditor is alleged. The injury complained of was directed at the corporation, and not the individual stockholder. Hence any injury which he, as a stockholder, received was indirect, remote, and consequential. If a stockholder could successfully maintain such a suit, why not any creditor of the corporation? A creditor would apparently be injured in the same way and to the same extent as a stockholder, assuming that their interests were equal. * * * There must exist some barrier which will effectually prevent such a multiplicity of units as the plaintiff's position suggests, and we believe not only that that barrier exists, but that it is found now just where it was prior to the passage of the act in question."

See also,

Howe v. *Barney*, *45 Fed. Rep. 668.*
Craig v. *Gregg*, *83 Pa. St. 19.*
Hirsh v. *Jones*, *56 Fed. Rep. 137.*
McMullen v. *Ritchie*, *64 Fed. Rep. 262.*

In the present case the plaintiffs were not even stockholders of the corporations which are alleged to have been injured by the acts charged against the defendants. They are merely the stockholders of the United Copper Company, which was the controlling stockholder of those corporations.

That the action to recover treble damages is one at law, was decided in *Metcalf* v. *American School Furniture Co.*, *108 Fed. Rep. 909*, affirmed in *113 Fed. Rep. 1020*, following *Pidcock* v. *Harrington*, *64 Fed. Rep. 821* and *Southern Indiana Express Co.* v. *United States Express Co.*, *88 Fed. Rep. 659*, *aff'd. 92 Fed. Rep. 1022*.

Fleitmann v. *United Gas Improvement Co.*, *211 Fed. Rep. 103*, was to the same effect. There Judge

Coxe, whose opinion was adopted by Judges Lacombe, Ward and Rogers sitting in the Circuit Court of Appeals said:

"An individual cannot maintain a suit in equity under the Anti-Trust Act. The complainant is an individual, and this is such a suit. An individual can only sue for three-fold damages within the act and this must be in a suit at law * * *."

"The Consolidated Company could bring an action at law under the permission implied in section 8, but where in the law is the right given to a single stockholder to maintain such an action? A law which grants such drastic relief must be strictly construed; the right to maintain an action not mentioned in the law cannot be implied. * * * If such tremendous power is to be given a single stockholder, the appeal should be made to the legislative and not the judicial branch of the government."

That decision was affirmed here, *sub nom Fleitmann* v. *Welsbach Co.*, 240 U. S. 27, where it was held, that a suit in equity by a single stockholder of a corporation against it and other corporations to require the latter to pay to the former three-fold damages under §7 of the Sherman Act cannot be maintained, nor, in such a case, can there be a decree requiring the corporation of which plaintiff is a stockholder to sue the other corporations or permitting him to sue in its name and on its behalf.

II.

The cause of action being concededly vested in the defendant United Copper Company, and the plaintiffs having concededly sustained no direct injury, they cannot maintain this action merely because they are stockholders of the Company and the latter has refused to bring it.

(1) There is no proposition of law more elementary than that declaring that an action can only be maintained by the person or corporation sustaining an injury sought to be remedied.

In *1 Chitty Pleading, 1*, the author says:

"The general rule is that the action should be brought in the name of the party whose legal right has been affected."

In *Gray* v. *Pearson, L. R. 5 C. P. 568*, Mr. Justice Willes said:

"I am of the opinion that this action cannot be maintained, and for the simple reason—a reason not applicable merely to the procedure in this country, but one affecting all sound procedure—that the proper person to bring an action is the person whose right has been violated."

The test of remedial interest in a court of law, if there is no statute to the contrary, is the test of legal title. Where the plaintiff in a court of law shows no legal title to the cause which he has pleaded, the fact even that the entire beneficial

ownership appears in him does not warrant an action in his name as plaintiff.

1 Chitty Pleading, 2.
2 Dicey on Parties, 330.
Young v. *Miller, 6 Gray, 152.*
McLean County Coal Co. v. *Long, 91 Ill. 617.*
Martel v. *Desjardin, 92 Me. 413.*
Usher v. *West Jersey R. R. Co., 126 Pa. St. 206.*

This is true whether the cause of action sounds in contract or in tort. One not a party to a contract, or one not directly the sufferer from a tort, has no right to invoke the intervention of a court for redress. Not even the State can sue for the recovery of damages sustained by one of its municipalities.

People v. *Ingersoll, 58 N. Y. 1, 13.*

In the course of his opinion in that case Judge Allen said:

"The title to and ownership of the money sought to be recovered must determine the right of action, and if the money did not belong to the State, but did belong to some other body having capacity to sue, this action cannot be maintained. * * * The party to maintain an action for a tort or wrong to property must be one whose property rights have been tortiously interfered with or invaded—one who, as trustee, special property man, bailee or general owner, has been pecuniarily damaged. The State cannot, any more than an individual, have a civil action for the recovery of money, whether by way of damages for fraud or other wrong, the wrongful conversion of chattels, or for money received by and in the possession of

others, except upon proof of title and ownership. * * * If the property of a corporation be illegally interfered with by corporation officers and agents or others, the remedy is by action at the suit of the corporation, and not of the Attorney-General."

People v. *Booth*, *32 N. Y. 396.*
People v. *New York & Manhattan Beach Ry. Co.*, *84 N. Y. 568.*
People v. *O'Brien*, *111 N. Y. 33.*

(2) *A corporation and its stockholders are entirely separate entities. The rights of the one are independent of the other.*

Buffalo, L. T. & S. D. Co. v. *Medina G. & E. L. Co.*, *162 N. Y. 67.*
Saranac & Lake Placid R. R. Co. v. *Arnold*, *167 N. Y. 368.*
MacDonnell v. *Buffalo, L. T. & S. D. Co.*, *193 N. Y. 92.*

(3) *The stockholders of a corporation cannot sue at law in its behalf; nor can they determine when an action shall be instituted by it.*

That right is vested in the board of directors, to whom the management of the corporation is entrusted. If one stockholder had the right to sue, in his own name, for the purpose of enforcing a cause of action vested in the corporation, then every stockholder would have a similar right; and in a corporation which has issued $50,000,000 of stock, as has the United Copper Company, the number of suits which might be maintained would be legion.

The cause of action vested in the corporation is one entire thing. It is not capable of subdi-

vision. Nor do the plaintiffs assert that it is. They bluntly say that, although the cause of action which they are seeking to enforce is vested in the corporation, they nevertheless have the right to inject themselves into the situation, to take the place of the board of directors and of the corporation, which represents the aggregate interests of all the stockholders, and to sue on the cause of action so vested in the corporation. With equal right, the plaintiffs might maintain an action to enforce a promissory note held by the corporation, or to recover for goods sold and delivered, or money loaned by it, or for rent owing to it.

In this aspect the case greatly resembles *Quincy v. Steel, 120 U. S. 241.* There the City of Quincy, in 1877, contracted with the Quincy Gas Light and Coke Company, of which Steel was a stockholder, to supply it with gas for four years. Disputes arose, payments were in arrear, and in May, 1881, the city notified the company that it would be no longer bound by the contract. More than four years later the plaintiff filed a bill in equity, *setting forth that the company had a claim against the city recoverable at law*, that he had at different times tried to induce the directors to enforce it, and had not succeeded; the claims were about to be barred at the Statute of Limitations, and he asked for a mandamus to compel the payment of the company's debt. A demurrer was sustained, and in the course of the opinion Mr. Justice Miller said:

"In this case the real right of action and the real contest before the court, if it had proceeded, would have been between the two corporations, organized under the laws of Illinois. * * * By sustaining this bill the gas company recovers a judgment in terms against the city for the

amount in controversy under the contract. * * * In the present case it is but a plain suit to recover damages on a written contract by the one corporation against the other on account of a violation of that contract, *except as Mr. Steel endeavors to bring himself into the case as having rights which he cannot enforce in a court of law.* It is purely and simply a suit to recover money on a written contract in an action in the nature of assumpsit."

In *Hawes* vs. *Oakland, 104 U. S. 450*, Mr. Justice Miller said:

"This corporation, like others, is created a body politic and corporate, that it may in its corporate name transact all the business which its charter or other organic act authorizes it to do. Such corporations may be common carriers, bankers, insurers, merchants, and may make contracts, commit torts, and incur liabilities, and may sue or be sued in their corporate name in regard to all of these transactions. The parties who deal with them understand this, and that they are dealing with a body which has these rights and is subject to these obligations, and they do not deal with or count upon a liability to the stockholder whom they do not know and with whom they have no privity of contract or other relation. * * *

"This is a very different affair from a controversy between the shareholder of a corporation and that corporation itself, or its managing directors or trustees, or the other shareholders, who may be violating his rights or destroying the property in which he has an interest. Into such a contest the outsider, dealing with the corporation through its managing agents in a matter within their authority, cannot be tagged, except where it is necessary to prevent an absolute failure of justice in cases which have been recognized as exceptional in their character and calling for the extraordinary powers of a court of equity. *It is, therefore, always a question of equitable jurispru-*

dence, and as such has, within the last forty years, received the repeated consideration of the highest courts of England and of this country."

In *Brewer* v. *Boston Theatre, 104 Mass. 386,* Judge Wells said:

"*It is unquestioned that, at law, no action could be maintained for the causes set forth, otherwise than in the name and by the authority of the corporation itself.* Ordinarily the same rule will apply in equity. It is only from the necessity of the case, and to prevent a failure of justice, that suits in equity in the form of these bills are allowed. To justify a suit in this form, the bill must show that suitable redress is not attainable through the action of the corporation. To this extent, all authorities agree."

In *Mason* v. *Henry, 152 N. Y. 537,* Judge Gray said:

"The position of a stockholder or policyholder, in proceeding against the directors or trustees of a corporation, would be quite different with respect to the form of remedy. *He could not sue at law, but must sue in equity. His right of action is purely of an equitable character.* Where directors or trustees, who are the corporate agents in the transaction of the corporate business, have committed the wrongful or illegal acts from which injury will accrue, or has accrued, to the corporate property and assets, *a court of equity* will entertain jurisdiction of a suit by a stockholder, or policyholder, in his own name, to obtain that relief which the corporation might have sued for itself."

In *People* v. *Equitable Life Assurance Society, 124 App. Div. 733, 734,* it was held that an action at law was maintainable against the directors of a corporation for damages sustained by it in consequence of their wrongful or negligent official acts

falling within the terms misfeasance or nonfeasance. Mr. Justice Laughlin added:

"If the corporaton failed to enforce the causes of action, a stockholder, on account of his personal interest as equitable owner of an undivided share in the assets, is permitted in equity, *although he has no standing at law*, to bring an action in the right of the corporation for the benefit of all stockholders as well as himself, to enforce the causes of action, whether of a legal or of an equitable nature."

That a stockholder's action is essentially equitable, is further established in *Brinckerhoff* v. *Bostwick, 99 N. Y. 185, s. c., on second appeal, 105 N. Y. 567, and Kavanaugh* v. *Commonwealth, 181 N. Y. 121.*

(4) *The complaint contains no allegation making a sufficient showing of plaintiffs' efforts to secure corporate action and the causes of their failure to secure such action.*

Even were it true that a stockholder may maintain an action, in the right of the corporation, at law, it would be necessary for the complaint to show a sufficient reason why the action is not brought by the corporation. An action by a stockholder in such a case is not based on a primary right vested in him. The cause of action is not his; it is that of the corporation. His right to sue is at the best derivative. Sound public policy demands that, before he is permitted to sue in the right of the corporation to exercise control over its business, to supersede its directors and, to make it a party defendant to the litigation, a convincing reason should appear why he rather than the corporation should seek to enforce the cause

of action or rather why he should act at all. The business of a corporation is conducted by its board of directors. They are charged by law to manage its affairs. The duty of enforcing its legal rights rests upon them. If they fail to act, the stockholders as a body should be enabled to exercise their powers of control, rather than that a single stockholder shall be permitted to take the place not only of the corporation and its directors, but of the stockholders in their aggregate capacity and to exercise their functions.

In the present case the plaintiffs have recognized that the burden rests upon them of establishing a reason for their intervention. All that they have alleged in their complaint, however, is that, before the commencement of the action, they made a demand upon the United Copper Company "that this or a like action be instituted by said corporation defendant and the corporation and its board of directors have refused to comply with the demand and have failed and refused to commence or cause to be commenced any action in compliance therewith." (*Rec. fols. 24, 25.*)

The demand is not made a part of the complaint; nor is there any written evidence of a refusal. There is nothing to show of whom the demand was made, or what facts, if any, were brought to the attention of the corporation or its board of directors. It is not stated, except inferentially, that any demand at all, was made on the board of directors. It is not pretended that any attempt was made to induce the stockholders of the corporation to act. There is nothing to indicate that the refusal of the defendant and its board of directors to accede to plaintiff's demand was not for good and sufficient reasons. There is

no charge of fraud or bad faith against them. There is no suggestion that the defendants against whom treble damages are sought had any interest in or exercised any control whatsoever over the United Copper Company or its board of directors. (*Kelly* vs. *Dolan, 233 Fed. Rep. 638.*) There is no pretense of the existence of a conspiracy or of collusion between the defendants and the board of directors of the United Copper Company.

The case is like *Post* v. *Buck's Stove & Range Co., 200 Fed. Rep., 920.* There the plaintiff, a stockholder of the defendant, sued to enforce for its benefit a cause of action against the American Federation of Labor and others, for treble damages under the Sherman Act. There had been previous litigation between the Stove Company and the Federation of Labor, which including a cause of action for treble damages was adjusted by settlement. The plaintiff protested against the settlement, and in communications to the officers and directors of the company demanded that having won its fight against the Federation on the charge that it had waged unlawful boycott, which was the basis of the previous litigation, its right to recover the damages sustained under § 7 of the Sherman Act treble in consequence of the boycott be enforced against the Federation. Failing in this effort he brought suit as a stockholder to enforce on behalf of the corporation the cause of action arising under the act, claiming the settlement to have been without consideration and void. In the course of his opinion denying the right to maintain the action Judge Hook, speaking for the Circuit Court of Appeals, said:

"As the authorized agents of a corporation, the directors represent not only the artificial body, but also all who own its shares of stock. While they must be mindful of the corporate welfare, and not act oppressively, fraudulently, or destructively of the corporate existence, or contrary to the laws of the state or nation, or the purposes for which the corporation was organized, or dissipate its assets, or secure private advantage at corporate expense, yet as its governing body they possess a wide discretion in determining its business policies and the methods of executing them, which a stockholder cannot control or have revised by an appeal to the courts."

A quotation from the opinion of this Court in *United States* v. *Union Pacific Ry. Co., 98 U. S. 569, 611,* followed:

"So long as it [a corporation] exists in the possession and unrestrained exercise of all its corporate powers, its board of directors, unless under judicial prohibition or compulsion, is vested with the sole authority to decide whether it will assert its right of action for a supposed injury, or will condone it."

In *Corbus* v. *Gold Mining Co., 187 U. S. 455,* Mr. Justice Brewer, after referring to Equity Rule 94, with his usual clarity, defined the powers of the directors of a corporation, with respect to the bringing abandonment or non-enforcement of causes of action existing in its favor:

"It must not be understood that a mere technical compliance with the foregoing rule is sufficient and precludes all inquiry as to the right of the stockholder to maintain a bill against the corporation. This court will examine the bill in its entirety and determine whether, under all the circumstances, the plaintiff has made such a showing of wrong on the part of the corporation or its officers and injury to himself as will justify the suit.

The directors represent all the stockholders and are presumed to act honestly and according to their best judgment for the interests of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder or at his instance submitted for review to a court of equity. *The directors may sometimes properly waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right. They may regard the expense of enforcing the right or the furtherance of the general business of the corporation in determining whether to waive or insist upon the right.* And a court of equity may not be called upon at the appeal of any single stockholder to compel the directors or the corporation to enforce every right which it may possess, irrespective of other considerations. It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs."

In *Pollitz* v. *Wabash R. R. Co., 207 N. Y. 124,* Judge Collin in similar laid down the general rule applicable to the powers of corporate directors, saying:

"They were the exclusive executive representatives of the corporation and were charged with the administration of its internal affairs and the management and use of its assets. Their corporate acts, within the powers of the corporation, in the lawful and legitimate furtherance of its purposes, in good faith and the exercise of an honest judgment, are valid and conclude the corporation and thestockholders. Questions of policy of management, expediency of contracts or action, adequacy of consideration, lawful appropriation of corporate funds to advance corporate interests, are left solely to their honest and unselfish decision, for their powers therein are without limitation and free from restraint, and the exercise of them for

the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient."

In *Hallenborg* v. *Cobre Copper Co., 200 U. S. 239*, there was a sale of nearly the entire stock of the corporation by its President, with whom it had been pooled for that purpose. The sale was made on the advice of the directors and was ratified by them and by a majority of the stockholders. A minority stockholder sought to set aside the transaction because, it was charged, the purchaser's object was to stop litigation brought against him by the corporation. Relief was denied, Mr. Justice McKenna saying (*p. 247*):

"It did not take from the stockholders the power to sell their stock, nor from the directors of the company the power to control the litigation in which the company was involved, *to abandon that litigation or to compromise it.* In the exercise of their power they could have done those things directly."

To similar effect are:

Continental Ins. Co. v. *N. Y. & Harlem Ry. Co., 187 N. Y. 225.*
Chambers v. *McKee, 185 Pa. 105.*
Donohoe v. *Mariposa Land & Mining Co., 66 Cal. 317.*
Bath's Case, L. R. 8 Ch. Div. 334.

The complaint in the present case does not contain a single suggestion to overcome the presumption that the board of directors of the United Copper Company acted honestly, in good faith and in the interest of the corporation, and that their re-

fusal to acquiesce in the plaintiffs' demand was for good and sufficient cause.

Although Equity Rule 94 (now Rule 27), which was in force when this action was commenced, related merely to suits in equity, it was preceded by the decision of this Court in *Hawes* v. *Oakland, 104 U. S. 450*, which led to the formulation of the rule. The principle embodied in the decision and rule is fully as applicable to an action at law as it is to a suit in equity, assuming that an action at law is under any circumstances maintainable by a stockholder for a cause of action vested in the corporation. The underlying reasons, as stated by Mr. Justice Miller, are so broad and comprehensive, and are so admirably calculated to prevent the abuses witnessed in litigation of this character, too often resorted to for purposes of blackmail, that obviously they cannot be confined in their operation to suits in equity. Among other things, he said (*pp. 460, 461*):

"But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.

"The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transaction of which he complains, or that his shares have devolved upon him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit. It is needless to say that appellant's bill presents no such case as we have here supposed to be necessary to the jurisdiction of the court. He merely avers that he requested the president and directors to desist from furnishing water free of expense to the city, except in case of fire or other great necessity, and that they declined to do as he requested. No correspondence on the subject is given. No reason for declining. We have here no allegation of a meeting of the directors, in which the matter was formally laid before them for action. No attempt to consult the other shareholders to ascertain their opinions, or obtain their action. But within five days after his application to the directors this bill is filed. There is no allegation of fraud or of acts *ultra vires*, or of destruction of property, or of irremediable injury of any kind."

In *Quincy* v. *Steel* (*supra*), the same principle was applied, Mr. Justice Miller saying:

"In the case before us he [the complainant] seems to have made but a single effort to induce the directors of the gas company to institute a suit against the city to recover the money, and this was by a communication in writing addressed to the board August 1, 1885. No copy of that letter is produced, but it is said that the board of directors laid the communication on the table. No copy of the order of the board upon that subject

is produced; no effort at conversation with any of the directors, or any earnest effort of any kind upon his part to induce the directors to bring the suit is shown in the bill; no attempt to call the attention of the shareholders to this matter during the four years in which he said he was a shareholder, and during which time the city was failing to pay its debt to the gas company, nor any effort at any of the meetings of the shareholders or of the directors to induce them to enforce the rights of the company against the city is shown. The most meagre description possible of a bare demand in writing, made sixteen days before the institution of this suit, is all we have of the efforts which he should have made to induce this corporation to assert its rights."

See also

Huntington v. *Palmer, 104 U. S. 482, 483.*
Corbus v. *Gold Mining Co., 187 U. S. 455.*

In *Detroit* v. *Dean, 106 U. S. 537,* Mr. Justice Field said:

"A single stockholder in a corporation has undoubtedly the same right to institute legal proceedings against the corporation for the protection of his individual rights that a third party not a stockholder possesses; but when he resorts to such proceedings, to protect, not simply such interests, but the property and rights of the corporation against the action or threatened action of third parties, thus assuming duties properly devolving upon its directors, he must show a clear breach of duty on their part in neglecting or refusing to act in the matter, amounting to such grossly culpable conduct as would lead to irremediable loss to him if he were not permitted to bring the matter before the courts. And such neglect and refusal must not be simulated, but real

and persisted in, after earnest efforts to overcome it."

The present case comes directly within these decisions. There is an absolute failure in the complaint, in the language of Rule 94, to "set forth with particularly the efforts of the plaintiffs to secure such action as they desired on the part of the managing directors or trustees" or "of the shareholders, and the causes of their failure to obtain such action."

It would be most extraordinary if the bare refusal by a corporation or its directors, to accede to the demand of one of its stockholders, to bring an action which may involve the corporation in enormous expense, would be a justification for the commencement of an action, by the stockholder, to enforce the right of the corporation. However lacking in merit the case may in fact be, however false the allegations, however unwarranted in law, however malign the motive of the stockholders desiring the action to be brought, it is the contention of the plaintiffs in error, that what is claimed to be a mere refusal to comply with the demand warrants the stockholder in suing in his own name on a cause of action alleged to belong to the corporation.

If that were so the formality of a demand and a refusal would be entirely unnecessary. It might as well be said, that any stockholder may, at any time, sue in his own name on any cause of action vested in the corporation, without further ceremony.

It is extraordinary that it has been reserved to the plaintiffs at this late day, to present to a court a contention such as that now made, which totally

ignores the character of a corporation and the nature of a stockholder's rights.

Although there have been many cases, in which stockholders have been permitted to maintain representative actions in the right of the corporation of which they are members, they have all proceeded on the theory, that under the facts established, resort to a court of equity by the stockholder was necessary, because the board of directors and a majority of the stockholders were shown to be guilty of actual or constructive fraud upon the corporation and of bad faith against its minority stockholders. In other words, equity intervenes because those to whom is confided the control and management of the corporation have been guilty of a breach of trust. Consequently, where efforts to obtain redress through the medium of the board of directors and of the stockholders have been exhausted, a stockholder may maintain an action in the right of the corporation against it because those in control of it have been recreant to their trust, and against such other corporations or individuals against whom a cause of action exists in its favor which it wrongfully refuses to enforce. But facts indicating the commission of a breach of trust must be alleged and proved. Such an action when brought is, however, one in equity and not at law.

Dodge v. *Woolsey, 18 How. 331,* which is the leading case on the subject in this country, arose on a bill in chancery.

So did *Foss* v. *Harbottle, 2 Hare, 461; Gray* v. *Lewis, 29 Law Times, 12; Robinson* v. *Smith, 3 Paige, 221; Morrill* v. *Little Falls Mfg. Co., 46 Minn. 260; Flynn* v. *Brooklyn City R. R. Co., 158 N. Y. 493; Continental Securities Co.* v. *Belmont,*

206 N. Y. 7, which are cited in the brief of the plaintiffs in error.

In *Sheridan* v. *Sheridan Electric Co., 38 Hun 396*, though brought as a stockholder's action and sustained on the theory that the plaintiff had a standing in a court of equity (*p. 398*) the actual appellant was the corporation, which at the time of the trial had passed out of the control of its recreant officers, and had become practically the plaintiff.

III.

The judgments of the Courts below should be affirmed with costs.

LOUIS MARSHALL,
Counsel for Defendant Adolph Lewisohn.

UNITED STATES SUPREME COURT

OCTOBER TERM, 1916.

No. 205.

UNITED COPPER SECURITIES COMPANY AND ARTHUR C. HAIRZE,

Plaintiffs in Error,

vs.

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, UNITED COPPER COMPANY, *et al.*,

Defendants in Error.

MEMORANDUM IN SUPPORT OF MOTION FOR SUBSTITUTION OF THE RECEIVERS OF THE UNITED COPPER COMPANY AS PLAINTIFFS IN ERROR.

FERDINAND E. M. BULLOWA,
EMILIE M. BULLOWA,
Of Counsel for Receivers.

The Lawyers Pocket Ink Publishing Company, Inc., 120 Fulton St., N. Y.

United States Supreme Court,

OCTOBER TERM, 1916, NO. 208.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE.
Plaintiffs in Error,

AGAINST

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, UNITED COPPER COMPANY *et al.*,
Defendants in Error.

Memorandum in Support of Motion for Substitution of the Receivers of the United Copper Company as Plaintiffs in Error.

This is a motion by the receivers of the United Copper Company of New Jersey appointed in Chancery of New Jersey, pursuant to the Laws of that State, because the Charter of the Company had been forfeited by proclamation of the Governor for non-payment of taxes. The Receivers pray that they may be substituted as Plaintiffs-in-Error in place and stead of the present Stockholders-Plaintiffs-in-Error by whom this action was brought in the right of the corporation because of its refusal and the refusal of its Board of Directors to institute an action against the defendants for damages suffered by the United Copper Company in its business and property, and by reason of the conspiracy and combination among the defendants other than the United Copper Company in restraint of interstate trade and commerce in copper.

POINT I.

It is not contended by the defendants-in-error that the United Copper Company has no cause of action against the other defendants for damages to its property and business by reason of the violation of the anti-trust act by the other defendants.

POINT II.

The motion of the statutory receivers to be substituted as plaintiffs-in-error is authorized by Section 954 of the Revised Statutes, and the practice of this honorable Court.

Bowden *v.* Johnson, 107 U. S. 264.
Gates *v.* Goodloe, 101 U. S. 613.

George D. Hendrickson and Luther Martin, Jr., appointed in Chancery of New Jersey as statutory receivers of the the United Copper Company are entitled to prosecute an action for the recovery of the damages suffered by the United Copper Company in its property and business, by reason of the wrongful acts of the other defendants, in violation of the Anti-Trust Act. The recovery of such damages if barred by the Statute of Limitations as against an independent action, may nevertheless be had in the action brought by the stockholders in behalf of the corporation and now pending and not barred by the Statute of Limitations.

POINT III.

The assests of the United Copper Company of New Jersey vested in George D. Hendrickson and Luther Martin, Jr., upon their appointment by Chancery in New Jersey as statutory receivers of the company.

The affidavits and papers in opposition are submitted on the theory that the appointment of John S. Sheppard, Jr., and Addison E. Cudworth, as receivers of the United Copper Company, by an order made by the United States District Court for the Southern District of New York in a suit brought by a creditor for the purpose of marshalling and distributing the assets of the Company among its creditors, and by their appointment as ancillary receivers by an order of the United States District Court for the District of New Jersey—become vested with title to the assets of the United Copper Company; and accordingly that George D. Hendrickson and Luther Martin, Jr., as receivers of the United Copper Company took no title by their appointment thereafter by an order made in Chancery of New Jersey in a statutory suit brought by stockholders for the appointment of receivers of the corporation, the charter of which had been forfeited.

In Penna. Steel Co. *v.* N. Y. City Ry. Co., 198 Fed. 728, Judge Noyes held that a receiver appointed as were John S. Sheppard, Jr., and Addison E. Cudworth by the Federal District Court in a creditor's action brought on the equity side of that Court, because of diversity of citizenship, were mere custodians of the property of the corporation, and in all things subject to the order of the Court. He said:

> "He is a ministerial officer with the function of a custodian. He derives his authority from

the court and not from the parties at whose instance he is appointed. He acts in behalf of no particular interests, but guards the rights of all. Being a mere holder his appointment does not change the title to the property in his charge, nor alter any lien of contract."

In Decker *v.* Gardner, 124 N. Y, 334, the Court said:

"Receivers appointed *pendente lite* are, however, mere temporary officers of the Court, and do not possess the powers of a permanent receiver unless specially conferred upon them by order of the court. The Court of Chancery, however, possessed and exercised in many cases the power to appoint receivers *pendente lite* of property which was the subject-matter of litigation before the court. Such receivers possessed no legal powers. They were officers of the court merely, and their functions were limited to the care and preservation of the property committed to their charge, and they possessed no authority except such as the orders of the court conferred. This power of appointment of a receiver *pendente lite* was one incidental to the jurisdiction of the court. It did not depend upon statute, and was not affected by the character of the parties before it, whether an individual or a corporation, or by the nature of the property.

"Jurisdiction to appoint receivers of corporations is wholly statutory. The power to declare a forfeiture of corporate franchises was originally in England vested in the courts of law, and was exercised in a proceeding brought by the attorney-general in the name of the sovereign. The Court of Chancery never assumed jurisdiction in such cases until it was conferred by act of parliament. It declined until the power was conferred by statute to sequestrate corporate property through the medium of a receiver, or to dissolve corporate bodies, or to restrain the usurpation of corporate powers. The courts of this country followed the English system. And the jurisdiction in such cases is now a subject of statutory regulation in most if not all the states."

The General Corporation Act of the State of New Jersey—revision of 1896—provides for the appointment of receivers on application to the Court of Chancery by any creditor or stockholder by petition or bill, whenever any corporation shall become insolvent, or shall suspend its ordinary business for want of funds to carry on the same, or when any corporation shall be dissolved. Section 68 of the Act is as follows:

> "68. PROPERTY VESTED IN RECEIVER. All the real and personal property of an insolvent corporation wheresoever situated and all its franchises, rights, privileges and effects shall, upon the appointment of a receiver forthwith vest in him and the corporation shall be divested of title thereto."

In Receivers *v.* The Paterson Gas Light Co., 23 N. J. L. 283, Chief Justice Green, in speaking of "The Act to Prevent Fraud by Incorporated Companies", said:

> "Like a bankrupt law, it vests the whole property of the corporation, by operation of law, in the hands of the assignees, to be distributed among the creditors upon principles of justice and equity. The appointment of the receivers being by operation of law, vests the rights and property of the corporation precisely in the same plight and condition, and subject to the same equities as the corporation held them. Receivers are not assignees for a valuable consideration, but are regarded as the voluntary assignees and personal representatives of the corporation."

In Hayes *v.* Pierson, 65 N. J. Eq. 353, the Court of Errors affirmed the right of a receiver to maintain a suit against Directors for mismanagement causing the insolvency of the corporation. It said:

> "That the right of the receiver is identical with that of the creditor is not the case. The receiver is, it is true, the representative of creditors, but he is also the representative of the

corporation and of its stockholders. If either the corporation or its stockholders may inquire into the acts charged in this appeal, the receiver may."

Section 68 of the Act of 1896 settled for New Jersey a question long in dispute as to whether a statutory receiver took title or only custody of the property of an insolvent corporation.

In McGraw *v.* Mott, 179 Fed. 646, it was held that Section 65 of the New Jersey Corporation Act—P. L. 1896, page 298, authorizing a suit by any creditor or stockholder to wind up the affairs of a corporation, which has become insolvent or suspended its ordinary business for want of funds to carry on same, creates a right which may be enforced in a Federal Court of Equity having jurisdiction of the parties.

The suit brought in the Federal District Court for the Southern District of New York, in which John S. Sheppard, Jr., and Addison E. Cudworth were originally appointed receivers of the United Copper Company, is, however, shown by a cursory reading of the bill of complaint to be the ordinary creditors' action brought in the Federal Court only by reason of diversity of citizenship, pursuant to the practice approved by this Court in *In re* Metropolitan, 208 U. S. 90. It is apparent that no attempt is made in the bill to come within the provisions of sections 56 and 65 of the New Jersey General Corporations Act. These provisions of the law of New Jersey, foreign to that of New York State, are not pleaded as facts and the requirements thereof are entirely foreign to the structure of the bill. The bill did not institute a proceeding *in rem*, such as is instituted by the bill or petition which authorizes the appointment of statutory receivers (Long Branch *v.* Sneden, 26 N. J. Eq. 539).

The suit brought in the Federal District Court for New Jersey was not the statutory action authorized under the General Corporations Act of New Jersey,

and the receivers appointed in that suit were merely ancillary. Indeed the petition for their appointment prays that ancillary receivers be appointed.

In Gallagher *v.* Asphalt Co., 65 N. Y. Eq. 258, Vice Chancellor Stevenson held that the appointment of a Federal Equity receiver was not the exercise of "the jurisdiction conferred by the New Jersey Statute upon the Court of Chancery, but of an entirely distinct jurisdiction which has been evolved by the decisions of the Federal Courts during a series of years, and this peculiar jurisdiction seems to be unlike any equitable jurisdiction—general equitable jurisdiction—that exists in the State of New Jersey".

> "The doctrine is established in a series of federal decisions that the assets of an insolvent corporation constitute a trust fund for creditors. This doctrine was announced a great many years ago by Judge Story. It has been very much criticized. Professor Pomeroy referred to the doctrine as one based on analogy and metaphor, 2 Pom. Eq. Sec. 1046. But this theory that the ordinary general assets of an insolvent corporation are a trust fund for creditors has been worked out in the federal courts so as to establish a somewhat unique branch of equity jurisdiction. And this is the peculiar situation to which the doctrine has been applied and which is fully illustrated in this case, in the United States Circuit Court for the District of New Jersey. A general creditor, who presumably, would be regarded as a beneficiary of the trust fund, has no power to come into a federal court with a bill in order to have the trust fund—the assets of the insolvent corporation of which he is a beneficiary—administered for his protection. * * * The court undertakes to seize and sequestrate the assets of the corporation, but it does it for the benefit of all the creditors of the corporation. * * * If the federal courts have entertained this suit simply so far as it is a proceeding to sequestrate assets for the benefit of creditors, and ancillary to that have granted an injunc-

> tion, which of course they had a perfect right to do, such injunction is not the statutory injunction and the receiver appointed by the federal court would not get title under our statute. The result would be that this court had full jurisdiction to grant the statutory injunction which I have held to be the only necessary object of the suit, disabling the corporation, putting it permanently under disabilities, preventing it from exercising its franchises. I say this court had jurisdiction to do that. No other court had done that thing, or undertaken to do that thing."

By reason of the devolution upon them, by operation of law, of the title to the cause of action now sought to be enforced by the stockholders, plaintiffs-in-error, in the right of the corporation in this action now pending upon writ of error in this Court, George D. Hendrickson and Luther Martin, Jr., the statutory receivers appointed in Chancery in New Jersey, moved this Honorable Court to be substituted as plaintiffs-in-error herein, so that they will be in a position, pursuant to section 66 of the Corporations Act of New Jersey, to demand and receive the damages sustained by the corporation by reason of the violation of the Anti-Trust Act by the defendants other than the United Copper Company, and to recover which damages this action was originally instituted by stockholders in the right of the corporation.

POINT IV.

The demand on the corporation as alleged in the complaint was adequate to justify the bringing of this representative action by the stockholders-plaintiffs-in-error.

There is no merit in the argument of the defendants-in-error in support of the judgment dismissing

the complaint upon the pleadings, on the ground that it fails to set forth a sufficient demand to entitle a representative action in the right of the corporation to be brought by stockholders. It is not necessary for a stockholder bringing a representative action to allege in his complaint on behalf of the corporation in addition to a demand upon the corporate Board of Directors and its refusal to bring an action—a demand upon the stockholders in meeting assembled and their refusal to take action in the premises.

In Continental Securities Co. *v.* Belmont, 206 N. Y. 7, the New York Court of Appeals said, at page 15:

> "It is insisted by the defendants that it was necessary for the plaintiffs in addition to alleging a demand upon the defendant corporation and its board of directors to bring the action and their neglect and refusal to do so, to allege that they had given notice of the alleged fraud to the body of stockholders of the defendant corporation and had demanded of said stockholders that some action be taken by them to redress the wrong, and that such body of stockholders had neglected and refused to take any action relating thereto. The cause of action belongs to the corporate body and not to the plaintiffs and other stockholders individually, nor to the body of stockholders collectively.
>
> "The board of directors represents the corporate body. It is provided by statute in this state that the affairs of every corporation shall be managed by its board of directors. General Corporation Law, Section 34. The directors are not ordinary agents in the immediate control of the stockholders. The directors hold their office charged with the duty to act for the corporation according to their best judgment, and in so doing they cannot be controlled in the reasonable exercise and performance of such duty.
> * * *
>
> "The claim of the appellants that the body of stockholders has some immediate or direct authority to act for the corporation or to

control the board of directors in the matters set forth in the complaint is based upon an erroneous conception of the duties and powers of the body of stockholders in this state. As a general rule stockholders cannot act in relation to the ordinary business of a corporation. The body of stockholders have certain authority conferred by statute which must be exercised to enable the corporation to act in specific cases, but except for certain authority conferred by statute, which is mainly permissive or confirmatory, such as consenting to the mortgage, lease or sale of real property of the corporation, they have no express power given by statute. They are not by any statute in this state given general power of initiative in corporate affairs. Any action by them relating to the details of the corporate business is necessarily in the form of an assent, request or recommendation. Recommendations by a body of stockholders can only be enforced through the board of directors, and indirectly by the authority of the stockholders to change the personnel of the directors at a meeting for the election of directors. Such action may or may not result in securing adequate, corporate action with reference to illegal or fraudulent acts. For reasons wholly apart from the matter in dispute the stockholders may not desire to change a majority of the persons comprising its board of directors. Some of the reasons why the power vested in stockholders to elect directors is inadequate as a remedy for specific fraudulent acts are stated by Cook in his work on Stock and Stockholders, section 740, in which he says: 'There has been considerable discussion as to whether the stockholder in addition to his request to the corporate officers to institute the suit, should not also be required to attempt to induce the stockholders in meeting assembled to take action by directing the directors to bring suit, or by refusing to re-elect them at the next election. The facts, however, that the stockholders in meeting assembled cannot control the discretion of the directors in bringing such a suit; that the remedy of refusing to re-elect them involves delay, and the assumption

that a minority of the stockholders can by the election control such a suit; that irreparable injury or the vesting of great financial interests may occur in the meantime; and the laches may arise as a bar to the stockholder's suit have settled the rule that the stockholder's request to the corporate directors to institute the suit is sufficient. He need not also apply to a stockholder's meeting. * * *

"It is the governing body or bodies of a corporation with power to enforce a remedy to whom complaining stockholders must go with their demand for relief. The governing body of corporations in this state, as we have seen, is the board of directors. A complaining stockholder must go to such board for relief before he can bring an action, unless it clearly appears by the complaint that such application is useless. If the subject matter of the stockholder's complaint is for any reason within the immediate control, direction or power of confirmation of the body of stockholders, it should be brought to the attention of such stockholders for action, before an action is commenced by a stockholder unless it clearly appears by the complaint that such application is useless.

"The decison reported in Hawes *v.* Oakland, 104 U. S. 450, and other similar decisions in the Federal and state courts are not in conflict with the decision about to be rendered herein. In such cases, as in this case, it is asserted that an application to the body of stockholders is unnecessary when it is unreasonable to require it. If the body of stockholders has no adequate power of authority to remedy the wrong asserted by the individual stockholders it is unreasonable and unnecessary to require an application to it to redress the wrong before bringing a representative action."

POINT V.

A representative action in the right of a corporation is maintainable because no direct damage has been suffered by the plaintiff stockholder in such action and because the corporate directorate refuse to sue.

There are two kinds of wrongs which a stockholder may seek to redress in the courts One involves an injury to his individual rights, directly and peculiarly to himself. The other involves an injury to the corporation directly, and only indirectly, through the corporation, to the stockholders. To redress an injury of the first kind, the stockholder sues in his own right. To redress an injury to the corporation the stockholder may sue in the right of the corporation. In the first case the stockholder is the actual plaintiff or complainant, and the corporation, and in some cases its directors, the actual defendants. In the second case the nominal and formal defendant is in reality the party injured or complainant.

The position taken by the defendants-in-error that an action can only be maintained by a person or corporation directly sustaining the injury to be remedied, is untenable. In Foss *v.* Harbottle, 2 Hare, 461, Vice Chancellor Wigram prophetically said that a case might arise of injury to a corporation for which no adequate remedy existed, and that he could not but think that "the claims of justice would be found superior to any claims arising out of technical rules respecting the mode in which corporations are required to sue."

Plaintiffs in error in the instant case seek to recover for the corporation, in this action brought by them in the right of the corporation, the damages suffered by the corporation. They do not seek to

recover damages suffered by them individually or in their own right. The distinction between the cases in which damage is done to the stockholder individually *qua* stock—property—owner, and where damage is done primarily to the corporation and only indirectly to the stockholder as the owner of an aliquot part of the profits of the corporation during its continuance in business, and an aliquot part of the assets of the corporation upon its dissolution,—is well illustrated in the case of Von Au *v.* Magenheimer, 126 N. Y. App. Div. 257. Miller, J. said:

"We may assume that the jury found they could not well avoid finding that the acts of the defendant in declaring a dividend of only three per cent. and increasing their salaries were wrongful and were done for the purpose of inducing the plaintiff to sell them her stock for less than it was worth. * * * It must be granted at the outset that where directors in bad faith and for purposes of their own refuse to make proper distribution of earnings, the injury is primarily to the stockholders collectively and must be redressed through the corporation by a suit in equity to compel proper action, and that where waste is committed the direct injury is to the corporation, and if the wrongdoers are in control of the corporation and refuse to sue, the remedy is by a representative action on behalf of the corporation. In such action an averment of reduction in the value of the stock is irrelevant. A stockholder cannot maintain a personal action for a wrong to the corporation merely because the indirect result is a diminution in the value of his shares. * * * I have referred to cases dealing with the remedy for injury to the corporation or the stockholders collectively. * * *

"In Walsham *v.* Stainton (1 De G., J. & S. 678), the leading English case most nearly analogous, directors conspired to depress the value of the shares so as to purchase them for less than their value. The scheme resorted to was the withholding of funds belonging to the corpora-

tion, so as to reduce the apparent earnings and the preparation of fictitious balance sheets. The action was in equity to set aside the sale and to compel the wrongdoers to account for all dividends and bonuses paid in respect of the shares sold. The lord justices on appeal reversed the ruling of the vice-chancellor sustaining the demurrer to the bill, and held that the action was maintainable. In pronouncing judgment Lord Justice Turner says, 'it is not denied (at least the Vice-Chancellor has not denied) that there would be a remedy at law against Joseph Stainton and his estate in respect of this breach of duty.' * * * Having the power to so manage the affairs of the corporation as to affect the value of her shares, they owed her the duty to refrain from intentionally abusing that power actually or apparently to depress the value of those shares for the purpose of acquiring them at an undervaluation. When they succeeded in securing her stock by that misuse of power they committed a breach of duty to her resulting in injury, and it is immaterial that their act may also have wronged the corporation. In view of the conditions under which business is now conducted it will be very unfortunate if it shall be held that the duty of corporate managers in respect of their conduct of the corporate affairs is solely to the corporate entity, and that however great a designed injury to an individual stockholder may be he can only get redress through the corporation. The purpose of the wrong being to injure the plaintiff that should be held to have been its effect. It surely cannot be the law that a conspiracy to injure by acts in themselves wrongful affords no remedy unless it fail. In the *Niles* case, cited *supra*, the stockholders collectively were indirectly injured precisely to the extent that the corporate assets were wasted; and a representative action on behalf of the corporation to compel the wrongdoers to make good the loss was adequate to protect both the corporation and the stockholders, because restoration of the corporate assets restored the value of the shares. And therein lies the distinction between an indirect injury to all stockholders resulting from a

direct injury to the corporation, which represents them collectively, and a direct injury personal to an individual stockholder, resulting from a wrong which may also injure the corporation but in a different way. In the latter case it would seem to be clear on principle that both could have an action for the wrong, the corporation to recover the damage suffered by it and indirectly by the stockholders collectively, and the stockholder to recover the damage peculiar to himself individually. Take the case of a corporation whose shares are actively dealt in—suppose the directors circulate false reports to depress the market value of the stock for the purpose of buying it in; the stockholder would be injured in the lessened market value of his shares, the corporation would probably be injured in its credit. Both could have their action, and the stockholder could sue without parting with his stock. It seems to me the case is no different if the same thing is accomplished by a different wrong, as for instance the misuse of power to prevent the distribution of earnings. I am speaking now of market as distinguished from intrinsic value of the shares. Nor again does the case seem to me to be different if, where the stock has no market value, the directors abuse their wide discretionary powers for the purpose of leading an individual stockholder to think that earnings will be consumed in other ways than the payment of dividends, thereby inducing him to sell at a low price. In the case at bar the stock had no market value, and the direct injury to the plaintiff resulted from the sale induced by the defendants' wrongs."

In Sheridan *v.* Electric Light Co., 38 Hun, 396, the action was brought by the stockholder in the right of the corporation at law to recover moneys retained by agents of the corporation. In Gray *v.* Lewis, 29 *Law Times*, 12, the suit was brought by a stockholder in the right of a corporation to recover from a Bank moneys deposited by the corporation. In both these cases the claims of the corpo-

ration sought to be enforced by stockholders in its right were enforceable only at law in an action against those who had wronged the corporation by breach of contract, or otherwise. There was no feature of equitable jurisdiction involved. In the language of Lord Justice James in Gray *v.* Lewis (*supra*), it appears "that the proper action is an action at law, and there is no reason on earth why the forum should be changed" because the corporation is brought into Court by a stockholder as plaintiff.

McCoy *v.* Gas Engine and Power Co., 135 N. Y. App. Div. 771, was a case where a suit to set aside an unconscionable contract was equitable in its nature. Judge Miller said:

> "The complaint does not allege a demand upon the corporation to bring an action, and the undisputed evidence shows that no demand was made, and that the action is in fact prosecuted by the corporation in the name of a stockholder. The plaintiff sought to excuse a demand on, and refusal by, the corporation to bring an action by showing that a majority of the directors who authorized the employment of the appellant were still in office. But the complaint does not allege that they were guilty of wrongdoing. The action being derivative, the plaintiff must show either a demand and refusal or that a demand would be futile, as where those in control are themselves the wrongdoers and there is reason to believe that, if the action were brought by the corporation, it would not be prosecuted in good faith. O'Connor *v.* Virginia Passenger & Power Co., 184 N. Y. 46. The theory of the action is, not that the directors have attempted to perpetrate a fraud upon the corporation, but that the appellant has perpetrated a fraud upon them."

The distinction between legal and equitable rights was made by Vice Chancellor Emery in Hodge *v.* U. S. Steel Corporation, 64 N. J. Eq. 111. It would seem with that distinction in mind, the Vice Chan-

cellor might have seen that a legal right even though prosecuted by a stockholder in a representative capacity on behalf of the corporation, should be enforced in an action at law. The Vice Chancellor said:

> "If the complainant's rights are legal as well as equitable, the court of equity may perhaps on the final hearing, or upon the application for preliminary injunction, consider the question of motive as bearing upon the right to equitable relief, and/or remit the complainant to his purely legal rights. But where property rights are equitable only, it would seem clear that whatever his motives in prosecuting a suit may be, he is not only entitled to have his case heard on final hearing, but also to have the protection by preliminary injunction, if his right be sufficiently established and such protection is absolutely necessary for the protection *pendente lite* of the equitable right."

In Herrick *v.* Dempster, 73 N. J. Eq. 145, Vice Chancellor Stevens said:

> "Under our practice the company is anomalously made a defendant."

In Groel *v.* United Electric Co. of New Jersey, 70 N. J. Eq. 616, Vice Chancellor Garrison said:

> "The real meritorious question in each case is between the formal defendant and the actual defendant, although the machinery for bringing the case into court is set in motion by the complainant. The formal defendant should have the right to object to and to question the power of the complainant to bring a suit in its behalf, but I do not think that the form in which it should raise this objection should be by plea or answer or demurrer.
>
> "In the English practice the corporation in whose behalf the suit is brought is made a party complainant. If the corporation thus made a party complainant, objects by petition, it is eliminated as a complainant and is made a defendant. Duckett *v.* Gover, 6 Ch. Div. 82, 85, Master

of the Rolls Jessel. Wilson *v.* American Palace Car Co., 64 N. J. Eq. 534.

"If we should adopt the practice by which the formal defendant should raise its objection by a petition setting forth such facts as it thought relevant, and giving the reasons why it thought the complaining stockholder should not be permitted to prosecute a suit in its behalf, the court could, upon such an issue properly determine the only question that ever should be permitted to be litigated between a formal defendant and the complainant, without in any way interfering with the real meritorious issue against the actual defendant."

POINT VI.

The claims of justice are superior to any claims arising out of technical rules.

The defendants in error argue that litigation by stockholders in the right of corporations, will be continuous, if the representative action is permitted to be brought at law. The contention is untenable. Equity suits by stockholders in behalf of corporations have not exhausted the courts. In Willoughy *v.* Chicago Junction Rys., 50 N. J. Eq. 656, it was held that a decree in such a suit is a bar to a suit instituted by another stockholder upon the same facts.

POINT VII.

Argumentum ad Hominum.

It would seem unnecessary to weary this Honorable Court with an explanation of charges which are not based on facts within the record. Accordingly such charges and insinuations are ignored.

LASTLY.

It is respectfully submitted that an order be made substituting the statutory receivers of the United Copper Company for the plaintiffs in error in this cause.

Respectfully submitted,

FERDINAND E. M. BULLOWA,
EMILIE M. BULLOWA,
Of Counsel for Receivers.

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 308.

(Originally No. 975, October Term, 1909.)

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs in Error,
vs.
AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, UNITED COPPER COMPANY et al.,
Defendants in Error.

Brief for Amalgamated Copper Company et al.,

in opposition to motion for substitution.

JOHN A. GARVER,
Counsel for Amalgamated Copper Company and other Defendants in Error,
44 Wall Street,
New York.

Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 208.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs in Error,

vs.

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, UNITED COPPER COMPANY, ET AL.,
Defendants in Error.

Brief for Amalgamated Copper Company, *et al.*, in opposition to motion for substitution.

Statement.

Application by George D. Hendrickson and Luther Martin, Jr., claiming to be receivers of the United Copper Company (one of the defendants), to be substituted in place of the present plaintiffs in error.

The plaintiffs in error, as stockholders of the United Copper Company, a New Jersey corporation, brought this action in the United States District Court for the Southern District of New York, under Section 7 of the Sherman Law, to recover treble damages ($15,000,000), alleged to have been

alleged fact that the Directors were not proper persons to liquidate the affairs of the Company ; but the complainants carefully withheld from the Court the fact that the Directors had nothing whatever to do with such liquidation, for the reason that the liquidation was in charge of Receivers duly appointed four years previously. Moreover, those Directors had been expressly enjoined, in 1913, by a court of competent jurisdiction, from in any way interfering with " any of the properties, assets or effects " of the Company (Opposing Papers, fols. 154–5). The conduct of Arthur P. Heinze and the other alleged stockholders of the United Copper Company, in attempting, by imposing upon the Court, to obtain control of the present litigation, was in obvious contempt of the United States District Court which appointed the 1913 Receivers, as the order appointing those Receivers expressly enjoined the stockholders, as well as the Directors, from interfering with the assets of the Company, or "*from instituting, commencing* or prosecuting any actions, suits or proceedings, at law or in equity, *or under any statute,* * * * against the defendant " (Opposing Papers, fols. 154–6). Arthur P. Heinze, in his verification of the bill in the Chancery suit, assumed to be entirely familiar with the history and affairs of the United Copper Company (Moving Papers, pp. 14–15).

III. The mere fact that the charter of the Company had been forfeited in February, 1912, for non-payment of taxes, did not deprive the District Court of jurisdiction in the general creditors' suit, in which Mr. Sheppard and others were appointed Receivers, in 1913.

Section 53 of the General Corporation Law of New Jersey is as follows :

> **" 53. Corporate existence continues.**
> All corporations, whether they expire by their own limitation or be annulled by the legislature or otherwise dissolved, shall be continued bodies corporate for

> the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established."

In the copy of the bill of complaint annexed to the petition herein, it is expressly alleged (p. 9), that, "on the dissolution of said United Copper Company as above set forth, it was, under the corporation laws of the State of New Jersey, continued a body corporate for the purpose of prosecuting and defending suits by or against it and of enabling it to settle and close its affairs."

Under this statute, even bankruptcy proceedings may be instituted against a corporation which has been dissolved in this manner.

> *In re* Munger Vehicle Tire Co., 159 Fed., 901 (C. C. A.).

IV. The validity of the appointment of the Receivers, in 1913, was expressly recognized by counsel for the petitioners, in appearing in the suit in which the Receivers had been appointed and, as attorney for various claimants, in filing with the Receivers claims against the United Copper Company (Opposing Papers, fols. 28-9).

SECOND.

No substitution in any event for plaintiffs in error.

The petitioners ask to be substituted for the plaintiffs in error. They do not ask to be substituted for the United Copper Company, of which they assume to be the receivers.

of the Company. The property was bought in by the bondholders and transferred to a new corporation. Subsequently, the stockholders attempted to repudiate the action of the directors in consenting to the foreclosure, and took an appeal to this Court from the foreclosure decree, in the name of the Company, and also moved for the appointment of a receiver to take over the property held by the new corporation. The motion was denied, on the ground that the changed position of the Company could not be shown on the appeal; and the Court said (p. 3):

> "Appeals in equity are heard upon the pleadings and proofs below. No new evidence can be admitted, and the pleadings cannot be amended in this court.
>
> "In this case, the pleadings fail entirely to disclose the defense which the appellant seeks now to make, and it does appear affirmatively that the original decree was by consent."

III. A case closely in point was decided by the Supreme Court of Indiana, which held that, where a complaint had been dismissed on the ground that the action was not brought by the proper party, a person authorized to maintain the action could not be substituted on the appeal.

> Maule Coal Co. v. Partenheimer, Adm., 155 Ind., 100.

In that case, an action was brought by an administrator of a man who had been killed while working in a coal mine. A statute regulating the operation of coal mines provided that where any person was killed by reason of a violation of the statute, an action for damages should accrue to the widow and children of the decedent. The administrator obtained judgment, which was reversed on appeal, on the ground that the cause of action vested in the widow (there being no children). The widow thereupon petitioned for a rehearing and asked to be substi-

tuted as the appellee. The motion was denied, the Court saying (pp. 111–112):

> "This court has no original but only appellate jurisdiction in actions of the character upon which this appeal is based, and it is authorized to hear and determine such causes only upon the record as it has been made in the trial court when certified up by its clerk. The petitioner, however, seeks to have this court in effect make a new and different record from that originally certified in the lower court, by substituting as plaintiff below and appellee here a new and entirely different person. If, under the circumstances, such procedure could be sustained, it would follow that whenever it was disclosed to this court, in the appeal of a cause, that the party who had successfully waged the contest below had no warrant under the law to maintain the action, for the reason that the right to do so was lodged in another and different person, then the party who had been mistaken in respect to his rights might be permitted to withdraw and the party authorized to maintain the action in the lower court be substituted in his stead as a party for the first time in this court and be allowed to occupy the same position and exercise the same rights as though he had been originally a party to the action. That such practice is not authorized under our appellate procedure certainly can not be controverted."

FOURTH.

Further evidences of the unfounded character of the action.

I. In our original brief, it was pointed out (Eleventh Point) that no cause of action in favor of the United Copper Company was shown, because it appeared that the Company was a mere holding company and that any injury sustained by it was merely that of a stockholder of the companies whose stock it held.

This fact is made still more clear in the moving papers, as it is expressly alleged in the bill of complaint attached to the petition (p. 10, par. 7), that the "United Copper Company was *a holding company.*" As the bill was verified by Arthur P. Heinze, one of the plaintiffs in error herein, who states (p. 15), that he was one of the organizers of the Company and a Director and Vice-President until 1908, there can be no doubt that the Company was not a mining and operating company.

The same fact also appears from the Opposing Papers. In the bill of complaint in the general creditors' suit, it was expressly alleged that the assets of the United Copper Company consisted of the stocks and securities of mining companies, which were referred to as "operating companies," and of an interest in some real estate and timber land in Canada (Opposing Papers, fols. 69–71). These allegations were expressly admitted by the answer filed by the Company (fol. 119).

II. The evidence of bad faith in bringing the action is made still more apparent by the moving papers.

1. The principal thing complained of in the complaint, in the case at bar, was the alleged forced sale, in 1906, by the companies controlled by the United Copper Company of their properties to the defendants or their nominees (Record, fol. 59). We argued, in our original brief (Twelfth Point, p. 24), that it was a reasonable inference from the facts alleged in the complaint that Arthur P. Heinze was a Director and officer of the United Copper Company at the time of this sale. As heretofore stated, it now appears affirmatively from his affidavit contained in the moving papers (p. 15), that he was a Director and Vice-President of the United Copper Company until 1908.

2. The imposition upon the Chancery Court of New Jersey in connection with the alleged appointment of the petitioners as receivers has already been re-

ferred to (*ante*, p. 3). The appointment was secured by Arthur P. Heinze and the immediate members of his family ; and one of the petitioners and alleged receivers, Luther Martin, Jr., is a relative of Ada L. Heinze, his sister-in-law, who is a party complainant in the New Jersey Chancery suit (Opposing Papers, fol. 29) ; while Calvin O. Geer, another complainant, has long been associated with "the said Heinzes," is employed in their office, and has been used by them as a nominal party plaintiff in many litigations prosecuted in their interest and in many corporations organized or controlled by them (Opposing Papers, fols. 11–12, 19–21, 27). That Arthur P. Heinze had no interest as a stockholder of the United Copper Company when, on February 28, 1917, he verified the bill of complaint in the suit brought in the Chancery Court of New Jersey, may be inferred from the fact that, for several years past, unsatisfied judgments against him for large amounts have been outstanding (Opposing Papers, fols. 21–23).

3. That Ferdinand E. M. Bullowa, Esq., the counsel for the plaintiffs in error, now appears as one of the counsel for the petitioners, thus supplementing the activities of Arthur P. Heinze and the members of his family, and that no notice of the present motion was given to the plaintiffs in error, are clear indications that the attempted appointment of the petitioners as receivers, followed by the present application for their substitution, was merely an underhand effort to avoid the consequences of the judgment under review. The evidence is conclusive, that both Arthur P. Heinze and his counsel, Mr. Bullowa, as well as Calvin O. Geer, had complete knowledge of the general creditors' suit and of the appointment in 1913 of the Receivers in that suit (Opposing Papers, fols. 28–9).

FIFTH.

The motion should be denied.

Washington, April, 1917.

JOHN A. GARVER,
Counsel for Amalgamated Copper
Company, *et al.*,
Defendants in Error.

United States Supreme Court.

OCTOBER TERM, 1910.

No. 858.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs in Error,

vs.

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, UNITED COPPER COMPANY ET AL.,
Defendants in Error.

Opposing Papers

of

Defendants in Error,

in opposition to motion for substitution.

LOUIS MARSHALL,
Counsel for Adolph Lewisohn.

JOHN A. GARVER,
Counsel for Amalgamated Copper Company et al.

EDWARD LAUTERBACH,
Counsel for Estate of Leonard Lewisohn.

C. G. Burgoyne Printing Business, 1036 Spring St., New York.

Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 208.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs-in-Error,
(Plaintiffs below),

AGAINST

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, UNITED COPPER COMPANY, and others,
Defendants-in-Error,
(Defendants below).

UNITED STATES OF AMERICA,
State of New York,
CITY & COUNTY OF NEW YORK, } ss:

LOUIS MARSHALL, being duly sworn, deposes and says:

I am one of the counsel for the defendants-in-error herein. This action was brought on May 3, 1912, by the two plaintiffs in error, United Copper Securities Company and Arthur P. Heinze, suing in their own behalf and in behalf of all other stockholders of the United Copper Company, of which they claim to be stockholders, to recover three-fold the damages which the United Copper Company is alleged to have sustained by the acts of the several defendants other than the

United Copper Company. The defendants demurred to the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action and that the plaintiffs' remedy, if any, was in equity. The demurrer was sustained by the United States District Court for the Southern District of New York, and judgment dismissing the complaint was duly rendered on September 24, 1914.

A writ of error to the United States Circuit Court of Appeals for the Second Circuit to review such judgment was allowed, and thereafter a judgment was rendered by said United States Circuit Court of Appeals, on April 23, 1915, whereby the judgment of the District Court was affirmed with costs.

A writ of error to review that judgment by this Court was allowed on June 24, 1915, and is now pending for argument. The briefs of the counsel for the respective parties have been duly filed with the Clerk of this Court, and interchanged, and the defendants in error have been prepared to argue this cause on the merits as soon as reached on the regular call of the docket.

On April 5, 1917, I received papers purporting to be a motion on behalf of the United Copper Company, by its alleged receivers George D. Hendrickson and Luther Martin, Jr., to be substituted for the plaintiffs in error, such motion being returnable on April 9, 1917. It has been stipulated that the hearing of that motion be postponed until the argument on the writ of error herein.

The petition on which such motion is based and which is verified by George D. Hendrickson, who apparently has no knowledge of the history of this case, alleges that demand was made by the plaintiffs upon the United Copper Company to institute the action brought by them but that it refused so to do, and further alleges that the United Copper Company was at that time under the control of Lucius A. Dunham, Charles W. Saacke, George Lane, Bernard C. Hughes and John B. Coates, "who were not fit and proper persons to conduct the affairs of said corporation in that they disregarded the rights of the shareholders and dissipated and diverted the assets of the company, as more fully appears by the complaint in the suit in which the receivers were appointed as aforesaid, a copy of which is hereto annexed."

The complaint thus referred to is one in which Calvin O. Geer, Arthur P. Heinze, Ruth Noyes Heinze and Ada L. Heinze are complainants and the United Copper Company is defendant. That complaint is verified by Arthur P. Heinze, who is one of the plaintiffs in error in the present cause.

There is no allegation whatsoever in the complaint in the present cause which identifies the directors of the United Copper Company; nor is there any allegation to the effect that the directors of the United Copper Company were not fit and proper persons to conduct its affairs, or that they disregarded the rights of the shareholders or dissipated and diverted its assets, or which in any way questions their integrity or good faith.

The complaint in the present cause was verified by Arthur P. Heinze, who alleges that he is one of the plaintiffs and an officer of the United Copper Securities Company, the other of the two plaintiffs herein. He is the same person who is one of the complainants in the suit brought in the Court of Chancery of New Jersey for the appointment of receivers of the United Copper Company, and who verified the bill of complaint in that case. In the verification he states that he was one of the organizers of the United Copper Company and a Director and Vice-President of that company until 1908. Ruth Noyes Heinze, another of the complainants in that suit, is his wife; Ada L. Heinze, also one of the complainants therein, is his sister-in-law; and Calvin O. Geer, the remaining complainant in that suit, is and for a long time has been one of the officers of the United Copper Securities Company, one of the plaintiffs in error herein, and as such officer, on June 22, 1915, executed in its behalf, the undertaking accompanying the writ of error to this court, and verified the first amended complaint in another action brought by the United Copper Securities Company against a number of the defendants herein contemporaneously with the commencement of this cause.

The complaint in this cause alleges a combination and conspiracy to bring about a monopoly in interstate commerce in copper by alleged unfair and unlawful means, which are set forth in the complaint. This conspiracy is alleged in paragraph XIV of said complaint to have been entered into in or about the year 1897. The acts complained of to have accom-

plished such a conspiracy are alleged to have occurred at various times between 1899 and 1906. Leonard Lewisohn, one of the alleged conspirators and whose executors and trustees are made parties defendant herein, is alleged to have died on or about March 5, 1902, and Henry H. Rogers, another of the alleged conspirators and whose executors and trustees are also made defendants, is alleged to have died on or about May 19, 1909.

In paragraph XII of the complaint, it is alleged that the wrongful conspiracies referred to in the complaint were in part accomplished in and during the year 1906, and in part in and during the year 1907, and in part in and during the year 1908, and in part in and during the year 1911, and in part up to the time of the making of the demand set forth in paragraph IV of the complaint, which is said to have been in January, 1912.

It is thus obvious that, so far as the United Copper Company or its officers are concerned, any cause of action which may have accrued to them by reason of any of the facts set forth in the complaint herein, especially as to any acts accomplished prior to 1911, has been barred by the Statute of Limitations. There is no allegation in the complaint as to any wrongful acts committed by the defendants or any of them in the year 1911, or at any time thereafter.

If the cause of action in favor of the United Copper Company or its receivers has been barred by the Statute of Limitations, their substitution as plaintiffs in this action at this time is unwarranted. If such cause of action has not been barred by the Statute of Limitations, there is nothing to prevent the institution by them at this time of a proper action to enforce any cause of action existing in their favor against the defendants.

LOUIS MARSHALL.

Subecribed and sworn to before me this 9th day of April, 1917.

LOUIS COHEN,
Notary Public No. 108,
N. Y. Co.

(SEAL)

UNITED STATES SUPREME COURT.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE, Plaintiffs in Error, AGAINST AMALGAMATED COPPER COMPANY, ET AL., Defendants in Error.	October Term, 1916. No. 208.

UNITED STATES OF AMERICA,
State of New York,
COUNTY OF NEW YORK, } ss.:

JOHN A. GARVER, being duly sworn, deposes and says:

1. I am counsel for the Amalgamated Copper Company and other defendants in error herein; and I have been of counsel for the said Company continuously for more than sixteen years last past.

2. The motion papers, on the motion by the petitioners herein to be substituted for the plaintiffs in error, were not served until the afternoon of Thursday, April 5, 1917.

3. During the past sixteen years, Calvin O. Geer, who appeared as one of the complainants in the suit brought in the Court of Chancery, in New Jersey (a copy of the bill of complaint in which is annexed to the petition for substitution herein), has appeared, from time to time, in association with Arthur P. Heinze and other members of his family, in connection with litigation between the said Heinzes and the Amalgamated Copper Company and its affiliated companies; and he has also been connected, as an officer or otherwise, with various corporations organized and controlled by the said Heinzes; and I am informed and believe that he is still associated in business with them and occupies an office in the

City of New York with the said Arthur P. Heinze and his brother, Otto C. Heinze.

4. Arthur P. Heinze, one of the plaintiffs in error herein and one of the complainants in the said suit in the Chancery Court of New Jersey, was a member of the firm of Otto Heinze & Co., of the City of New York, which failed during the financial panic of 1907. On October 24, 1912, judgment was entered against the members of the said firm, including said Arthur P. Heinze, for $19,457.07, in an action brought in the Supreme Court of the State of New York, County of New York, by Henry P. Hatch and another against the said firm, in which I was one of the attorneys for the plaintiffs. Execution was duly issued on that judgment and was returned unsatisfied ; and no part of the said judgment has been paid.

On October 24, 1912, judgment was also obtained against the said Arthur P. Heinze, personally, in an action brought in the Supreme Court of the State of New York, County of New York, by Henry P. Hatch and another against the said Arthur P. Heinze, for $10,087.81, in which action I was one of the attorneys for the plaintifis. Execution upon that judgment was duly issued and was returned unsatisfied ; and no part of the said judgment has been paid.

5. I am informed and believe that numerous other judgments, aggregating more than $100,000, have been entered against the said Arthur P. Heinze in the City and County of New York, in actions brought against him, and that none of such judgments have been paid or satisfied. I do not believe, therefore, that when the said Arthur P. Heinze verified the bill of complaint on February 28, 1917, in the suit brought by him in connection with Calvin O. Geer and others against the United Copper Company, in the Court of Chancery of New Jersey, referred to in the petition herein, he held any of the capital stock of the United Copper Company ; and if he did hold any of such stock, it was in fraud of his creditors if it had any value.

6. In February, 1912, another action similar to this was commenced in the United States District Court for the Southern District of New York, by the above mentioned United Copper Securities Company against the defendants in error herein, and others, to recover treble damages ($12-, 000,000), under Section 7 of the Sherman Law. In that action, which is still pending, the United Copper Securities

Company, in the original complaint, sued as the alleged assignee of four alleged causes of action, one in favor of Arthur P. Heinze, as trustee, another in favor of Arthur P. Heinze, individually, a third in favor of Ruth Noyes Heinze (the wife of the said Arthur P. Heinze), and a fourth in favor of the said firm of Otto Heinze & Co. The original complaint in that action was verified by Arthur P. Heinze, who stated that he was " an officer and agent of the plaintiff corporation ". Thereafter, an amended complaint was served ; and, on motion of the defendants, the reference in the amended complaint to the cause of action in favor of Arthur P. Heinze, as trustee, was stricken out. Subsequently, a second amended complaint was served, in which all reference to any cause of action in favor of Arthur P. Heinze, individually, was omitted. Thereafter, a third amended complaint was served, in which the alleged cause of action in favor of Ruth Noyes Heinze was omitted, leaving only the claim in favor of the firm of Otto Heinze & Co., which, it was alleged, had failed in 1907. The plaintiff, the United Copper Securities Company, claimed to have succeeded to these various claims through certain mesne assignments. The original complaint in that action was verified by Arthur P. Heinze ; and the first, second and third amended complaints were verified by Calvin O. Geer, who stated that he was " an officer and agent " of the said Company. Ferdinand E. M. Bullowa, Esq., has been the attorney of record for the plaintiff in that case, as he has been in the case at bar.

6. I am informed and believe that, at the time of commencement of the suit in the Court of Chancery, New Jersey, for the appointment of the petitioners herein as Receivers of the United Copper Company, both the said Ferdinand E. M. Bullowa and the said Arthur P. Heinze were fully aware of the appointment of John S. Sheppard, Jr., and others as Receivers of the United Copper Company, in 1913 ; for in the said general creditors suit, in which the said Receivers were appointed, Henry D. Estabrook, Esq., was appointed Special Master, with whom claims of creditors were filed, and, among such claims, were several in favor of the Nassau Assets Collecting Company which were stated to have accrued in favor of Arthur P. Heinze, Ruth Noyes Heinze and others, respec-

tively. These claims were filed by the said Ferdinand E. M. Bullowa, as attorney, in 1913. I am informed and believe that the said Nassau Assets Collecting Company is a corporation which was organized at the instance of the said Arthur P. Heinze and his brother, Otto C. Heinze and that said Calvin O. Geer was one of its officers.

7. I am informed and believe that Luther Martin, Jr., one of the petitioners herein, is a son of Luther Martin, a brother of Ada L. Heinze, who is the sister-in-law of the said Arthur P. Heinze.

JOHN A. GARVER.

Subscribed and sworn to before me this 14th day of April, 1917.

JAMES L. BANKS, JR.,
Notary Public,
New York County No. 446,
New York Register No. 8867.
Commission Expires Mar. 30, 1918.

(SEAL.)

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW JERSEY.

MAURICE DEICHES, as Receiver of The Aetna Indemnity Company, Complainant,

AGAINST

UNITED COPPER COMPANY, Defendant.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY:

MAURICE DEICHES, as Receiver of the Aetna Indemnity Company, on his own behalf and on behalf of all other creditors of the defendant, United Copper Company, brings this his Bill of Complaint against United Copper Company, and thereupon your Orator complains and alleges as follows:

FIRST: Your Orator, Maurice Deiches, is a citizen of the United States and of the State of New York and a resident and inhabitant of the State of New York and of the Southern District of New York and of no other district within the meaning of the laws fixing and defining the jurisdiction of this Honorable Court. The defendant, United Copper Company, is a corporation duly organized under and by virtue of the laws of the State of New Jersey and is a citizen and inhabitant of the State of New Jersey and of the District of New Jersey within the meaning of the laws fixing and defining the jurisdiction of this Honorable Court. The Aetna Indemnity Company is a corporation, duly organized and existing under and by virtue of the laws of the State of Connecticut and is a resident and inhabitant of the State of Connecticut and of the District of

Connecticut withing the meaning of the laws fixing and defining the jurisdiction of this Honorable Court.

SECOND: The ground upon which the jurisdiction of this Honorable Court depends is that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Five thousand ($5,000) Dollars and is between citizens of different states.

THIRD: The following is a statement of the facts upon which your Orator seeks relief herein: On the 10th day of February, 1913, a suit was brought in equity in the United States District Court for the Southern District of New York by your orator, as Receiver of The Aetna Indemnity Company, against the above named defendant. A certified copy of the Bill of Complaint in said suit is hereto annexed, marked "Exhibit A" and made a part hereof, as if herein fully set forth. Upon said suit and Bill of Complaint being filed, the defendant answered the complaint thereof. A certified copy of said Answer is hereto annexed, marked "Exhibit B" and made a part hereof as if herein fully set forth. Upon said Complaint and Answer, a decree was duly made on the said 10th day of February, 1913, by the said United States District Court for the Southern District of New York, which decree was duly entered in the Office of the Clerk of the said Court on said day. A certified copy of the said decree is hereto annexed, marked "Exhibit C" and made a part hereof, as if herein fully set forth.

FOURTH: Pursuant to the terms of the said decree so marked Exhibit C, John S. Sheppard, Jr., and Addison E. Cudworth were duly appointed receivers of all the property, books and effects wheresoever situated of the above named defendant, with certain powers as more fully appears from the said Exhibit C hereto annexed. The said receivers so appointed have duly qualified by filing the bonds required of them by the said decree, as appears by the certificate of the Clerk of the District Court of the United States for the Southern District of New York at the foot of said Exhibit C, and the said receivers have duly entered upon the discharge of their duties as receivers in the said suit.

FIFTH: The above named defendant, as above stated, is a corporation duly organized under the laws of the State of New Jersey. Your orator is informed and verily believes and

therefore avers that the said corporation has a vault in the Hudson Trust Company, in Hoboken, County of Hudson, in the District of New Jersey, the contents of which vault are unknown to your Orator and to the said receivers, and it is necessary that the said receivers be duly authorized to open the said vault and to take possession of the contents thereof. Your orator is informed and verily believes and therefore avers that the stock books of the defendant and other corporate books and documents are located within the jurisdiction of this Honorable Court, to wit, in the office of the Hudson Trust Company, in Hoboken, County of Hudson, in the District of New Jersey.

SIXTH: That various parties have commenced suits against the above named defendant in the State courts of the State of New Jersey, and applications have been made in the said suits by the said parties for the appointment of temporary receivers and for other relief during the pendency of said suits, but that no receiver has been appointed in any of said proceedings or suits, or in any proceedings or suits whatever excepting in the suit brought by your Orator in the United States District Court for the Southern District of New York, as hereinbefore set forth.

IN CONSIDERATION WHEREOF, and inasmuch as your Orator is remediless in the premises at and by the strict rules of common law, and is relievable only in a Court of Equity, and by a suit of this nature where matters of this nature are properly cognizable and relievable, your Orator prays

1. That this Honorable Court will forthwith appoint John S. Sheppard, Jr. of the City, County and State of New York, and Addison E. Cadworth of Londonderry, Vermont, receivers of the defendant and of all the property of above named defendant situated within the territorial jurisdiction of this Court, with like powers as those granted by the Decree of the United States District Court for the Southern District of New York, of which decree a certified copy is annexed to the Complaint herein as Exhibit C.

2. That all officers, managers, employees, creditors and stockholders of the defendant company and all other persons, firms and corporations, including marshals, sheriffs, deputies and their servants and agents, be required forthwith to trans-

fer and convey and deliver up to such ancillary receivers possession of all property of the defendant situate within the jurisdiction of this Honorable Court.

3. That all persons, firms and corporations, including marshals, sheriffs, deputies and their servants and agents, and all other officers, and including all stockholders and all other creditors of the defendant, be enjoined from instituting, commencing or prosecuting, any actions, suits or proceedings, at law or in equity or under any statute, and from continuing the prosecution of or taking any further steps in any pending actions, suits or proceedings, at law or in equity or under any statute, against the defendant, and from levying or serving any attachments, executions or other processes upon the defendant or upon or against any of the property of the said defendant situate within the jurisdiction of this Honorable Court, and generally, that all persons, firms and corporations be enjoined from doing any act to interfere with the said ancillary receivers in their possession of the property of the defendant.

4. That a writ of injunction issue out of and under the seal of this Honorable Court, or issue by one of your Honors, directing, enjoining and restraining the defendant and its officers, agents and directors, and all other persons, including creditors, stockholders, sheriffs, marshals, constables, deputies and their servants and agents, from interfering with, transferring, selling or disposing of any of the property of the said defendant, within the jurisdiction of this Honorable Court.

5. That this Honorable Court will grant unto your Orator a writ of subpœna of the United States of America, issued out of and under the seal of this Honorable Court, directed to the defendant and commanding it on a day certain therein to be named, under a certain penalty, before this Honorable Court to answer (but not under oath, answer by oath being expressly waived) of and in the premises, and to stand by, perform and abide by such orders and decrees as may be made by this Honorable Court.

6. That such order shall be made by this Honorable Court as to the service of this bill of complaint and of any order that may be made in this suit as may be deemed sufficient and proper by this Court.

7. That your Orator may have such other and further relief as may be just and proper.

And your Orator will forever pray.

MAURICE DEICHES,
as Receiver of Aetna Indemnity Company,
Complainant.

CHAUNCEY G. PARKER,
Solicitor and of Counsel for Complainant.

STATE OF NEW YORK, }
County of New York, } ss.:

MAURICE DEICHES, being duly sworn, deposes and says that he is the complainant in the foregoing Bill of Complaint; that he has read the same and the matters and things therein set forth, and the same are true to the best of his knowledgs, information and belief.

MAURICE DEICHES.

Sworn to before me this 13th day of February, 1913.

GEORGE H. FITZGERALD,
[SEAL.] Notary Public,
Kings Co. No. 107,
Certificate filed in New York Co., No. 27,
New York Register No. 3095.

"Exhibit A."

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

MAURICE DEICHES, as Receiver of The Aetna Indemnity Company, Complainant,

AGAINST

UNITED COPPER COMPANY, Defendant.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

Maurice Deiches, as Receiver of The Aetna Indemnity Company (hereinafter called the "Indemnity Company") on his own behalf and on behalf of all other creditors of the defendant, United Copper Company, brings this its bill of Complaint against United Copper Company and thereupon your Orator complains and alleges as follows:

FIRST: Your Orator, Maurice Deiches, is a citizen of the United States and of the State of New York and a resident and inhabitant of the State of New York and of the Southern District of New York and of no other district within the meaning of the laws fixing and defining the jurisdiction of this Honorable Court. The defendant, United Copper Company, is a corporation duly organized under and by virtue of the laws of the State of New Jersey and is a citizen and inhabitant of the State of New Jersey and of the District of New Jersey within the meaning of the laws fixing and defining the jurisdiction of this Honorable Court. The Aetna Indemnity Company is a corporation, duly organized and existing under

and by virtue of the laws of the State of Connecticut and is a resident and inhabitant of the State of Connecticut and of the District of Connecticut within the meaning of the laws fixing and defining the jurisdiction of this Honorable Court.

SECOND: The ground upon which the jurisdiction of this Honorable Court depends is that the matter in controversy exceeds, exclusive of interest and costs, the sum value of Five thousand ($5,000) dollars and is between citizens of different states.

THIRD: The following is a statement of the facts upon which your Orator seeks relief herein: Heretofore and on or about the 9th day of January, 1911, in an action brought by Charles I. Brooks against the Indemnity Company in the Supreme Court of the State of New York, your Orator was duly appointed a Receiver of the above named Indemnity Company by an order of the said Supreme Court in and for the County of New York, dated January 9, 1911, and duly entered in the office of the Clerk of the County of New York on the said day.

FOURTH: Your Orator duly qualified as such Receiver and, in compliance with the terms of said order, on the 9th day of January, 1911, executed and acknowledged in the usual form and filed with the Clerk of the County of New York a bond to the People of the State of New York in the penal sum of Fifty thousand ($50,000.) dollars, with sufficient sureties as required by law, conditioned upon the faithful discharge of your Orator's duties as such Receiver and upon your Orator's duly accounting for all the moneys and property of every kind received by him as such Receiver, which said bond was approved on January 9, 1911, by the Hon. ALFRED R. PAGE, one of the Justices of the Supreme Court of the State of New York, and your Orator has since said time been and still is acting as such Receiver of the Indemnity Company.

FIFTH: By the said order of the Supreme Court for the County of New York, dated January 9, 1911, as aforesaid, your Orator was given full power and authority to demand, sue for, collect, receive and take into his possession, all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, bills, choses in action, notes and

property of every description belonging to the Indemnity Company in the State of New York.

SIXTH : Your Orator, as said Receiver, is a creditor to the defendant to an amount in excess of Five thousand ($5,000.) dollars. The said indebtedness arises out of and is based upon the following facts as your Orator is informed and verily believes and therefore avers : That on the 1st day of January, 1907, La France Copper Company, a corporation organized and existing under the laws of the State of New York, duly executed certain negotiable commercial bonds for value received, bearing date on said day, in the sum of One thousand ($1,000.) dollars each, payable to bearer on January 1, 1932 ; that concurrently with the issue and delivery of said bonds by La France Copper Company, the defendant, the Copper Company, by Stanley Gifford, its treasurer, for a valuable consideration and pursuant to authority conferred upon it by law, duly guaranteed in writing endorsed upon each of said bonds the interest thereon as follows :

> " For value received the payment of the interest on this bond is hereby guaranteed.
>
> UNITED COPPER COMPANY,
>
> By STANLEY GIFFORD,
>
> Treas."

The said guaranty so executed and delivered by the said defendant was so executed and delivered with due authority of the Board of Directors of said defendant and for value, and the said defendant had due power and authority, pursuant to law, and pursuant to the terms of its charter and its by-laws and certificate of incorporation to make, execute and deliver said guaranty. That the value received by the defendant for the issuance of said guaranty by the defendant consisted of the entire common stock of La France Copper Company, which was acquired by said defendant in consideration of the execution of the said guaranty. That at the time of the execution by the defendant of such guaranty there was attached to each of said bonds, coupons or interest warrants, each for the payment of thirty dollars interest on the first day of each succeeding January and July, and each of said bonds provided in terms that the interest

thereon, should be payable upon presentation and surrender of such coupons and interest warrants as and when the same should, respectively, become due and payable by the terms thereof. That heretofore and prior to January 20, 1909, said the Indemnity Company became the lawful owner and holder of three hundred and twenty-five (325) of said coupons so guaranteed by defendant, representing the semi-annual interest accruing on certain of said bonds as aforesaid, which said coupons are numbered respectively from 801 to 1100 and 1301 to 1325, all inclusive, and became due and payable on July 1, 1908. That all of the said coupons or interest warrants above enumerated are now in the possession of your Orator in the City, County and State of New York in the Southern District of New York. That in an action brought by said the Indemnity Company in the Supreme Court of the State of New York against the said La France Copper Company to recover the amount due on coupons above described, in which action the said La France Copper Company duly appeared, answered and defended, a judgment after trial was rendered in favor of the said the Indemnity Company and against said La France Copper Company for Eleven thousand one hundred and sixteen and $\frac{08}{100}$ ($11,116.08) dollars, which judgment was duly entered in the Office of the Clerk of the County of New York on the 1st day of July, 1910. That no part of said judgment has been paid. That although duly demanded by your Orator of La France Copper Company and of defendant, none of the said coupons or interest warrants was paid on the date it matured or at any subsequent time, and the amount of all of said coupons or interest warrants, to-wit, the sum of Nine thousand seven hundred and fifty ($9,750) dollars with interest from the first day of July, 1908, is now due from the Copper Company to your Orator as said Receiver, and defendant is now utterly unable to meet said demand or to pay said claim.

SEVENTH: Your Orator is informed and verily believes and therefore avers that the defendant has an outstanding capital stock of Fifty million ($50,000,000) dollars, divided into Five million ($5,000,000) dollars 6% Cumulative preferred stock of the par value of One hundred ($100) dollars per share, and Forty-five million ($45,000,000) dollars common stock of the par value of One hundred ($100) dollars per share.

EIGHTH: Your Orator is informed and verily believes and

therefore avers that the officers of the Copper Company are as follows:

President, L. A. Dunham,

Secretary and Treasurer, Charles W. Saacke,

Assistant Treasurer, John L. Williams.

NINTH: Your Orator is informed and verily believes and therefore avers that the assets of the defendant consist for the most part of shares of stock and other securities in certain mining corporations, of which the following are the chief: Montana Ore Purchasing Company; Pittsburgh and New York Coal Company; Stewart Mining Company; Ohio Copper Company; La France Copper Company and its successor the Atlantic Mines Company; Basin Reduction Company; Copper Securities Company. The said mining corporations are hereinafter designated "the operating companies".

Your Orator is informed and verily believes and therefore avers, that the said defendant also has holdings of stock in the following corporations among others, to wit: Davis Daly Copper Company; Bingham Mines Company; Bank of Discount; Fidelity Development Company; Western Utah Copper Company; Consolidated Steamship Line; Western Ice Company; Balanced Cable Crane Company and Opex Consolidated Mines Company; and that the defendant also owns or is beneficially entitled to a right or interest in or to certain valuable real estate, timber lands and rights situated in the Dominion of Canada.

TENTH: Your orator is informed and verily believes, and therefore avers, that the business of the defendant has consisted in fostering and assisting the business and credit of the said several operating companies, and in developing the properties owned or controlled by them. With this end in view, the defendant has advanced large sums of money to divers of the said operating companies, and by such advances has enabled the said operating companies to develop and expand their business and thereby incidentally increase the value of the holdings of the defendant in the capital stock of the said operating companies as aforesaid. These companies have assets of great value, and the value of the holdings of the defendant in the capital stock of the said operating companies would be lost or greatly depreciated if said holdings were disposed of separately through proceedings at law or ex-

cept through the intervention of a Court of Equity. Substantially the entire indebtedness of the defendant as hereinafter set forth was incurred for the purpose of loaning moneys to divers of the said operating companies and divers of the said operating companies are indebted, as hereinafter set forth, to the defendant in large amount of money so expended by the defendant in their behalf.

ELEVENTH: Your Orator is informed and verily believes and therefore avers, that among the unsecured liabilities of the defendant is its liability upon the guaranty by the defendant of the payment of interest on the bonds of La France Copper Company as hereinbefore set forth in paragraph Sixth of this Bill of Complaint, and upon certain notes of the defendant, made, executed and delivered to secure the said guaranty and in exchange for certain of the coupons or interest warrants appertaining to the said bonds of La France Copper Company and exchanged for and in consideration of the issue, execution and delivery of the said notes. Your Orator is informed and verily believes and therefore avers, that the said bonds of La France Copper Company were duly issued for value, and the said bonds and said coupons or interest warrants appertaining thereto and the said notes are now outstanding in the hands of various *bona fide* purchasers. The total liability of the defendant upon the said guaranty and upon its said notes so executed as aforesaid, amounts to the sum of about Two million eight hundred and eighty thousand ($2,880,000) dollars. Of the said entire indebtedness on the said guaranty and on the said notes as aforesaid, about Four hundred and sixty thousand ($460,000) dollars is already past due, and the defendant is at the present time without any moneys or means whatever to pay the said guaranty or the said notes, and at the present time has no means of raising the money wherewith to pay the same; and said La France Copper Company, the principal obligor, has been adjudged a bankrupt in proceedings pending in the United States District Court of Montana, and the assets of said bankrupt, La France Copper Company, are utterly insufficient to pay its debts, and the said bankrupt cannot and will not pay to its creditors more than ten per cent. (10%) of its said debts. Numerous actions have already been

commenced against the defendant upon the said guaranty and the said notes by divers of the holders of said notes and by the holders of said coupons or interest warrants. Said actions are now pending in the Supreme Court of the State of New York and also in the United States District Court for the Southern District of New York, and as your Orator is informed and varily believes and therefore avers, in other jurisdictions. Your orator is informed and varily believes and therefore avers, that numerous other suits are now threatened by other holders of said coupons or interest warrants and by other holders of the said notes.

TWELFTH: Your Orator is informed and verily believes and therefore avers, that in addition to the amount so owing upon the said guaranty and the said notes as aforesaid, the defendant owes about Twenty-one thousand seven hundred and thirty-four ($21,734) dollars to various unsecured creditors, most of which debts are at the present time due and unpaid.

THIRTEENTH: Your Orator is informed and verily believes and therefore avers that in addition to the unsecured indebtedness and liabilities of the defendant as hereinbefore set forth, the defendant is indebted to certain secured creditors in the sum of about One million six hundred thousand ($1,600,000) dollars, which indebtedness is secured by the larger part of the stocks, securities and other property of the defendant which are now held by the said secured creditors. That the said secured indebtedness is now due and payable and no part of the same has been paid. That the said stocks, securities and other property were pledged and mortgaged by the defendant for the purpose of obtaining money for its use in its business as aforesaid, and your Orator prays for the appointment of receivers herein in order that said receivers may, by appropriate arrangements with such secured creditors, if possible, take up the said loans or make such other provisions as to avoid the foreclosure sale of the property securing said loans. That any such foreclosure sale would at the present time, as your Orator fears, cause great and irreparable injury to your Orator and to the other unsecured creditors of the defendant.

FOURTEENTH: Your orator is informed and verily believes and therefore avers, that the total secured and unsecured indebtedness of the defendant therefore amounts to about Four

million five hundred and one thousand seven hundred and thirty-four ($4,501,734) dollars, of which the sum of Two million eighty-one thousand seven hundred and thirty-four ($2,081,734) dollars is now due.

FIFTEENTH: Your orator is informed and verily believes and therefore avers, that owing to lack of funds the defendant is at the present time without means to meet its indebtedness; but the defendant's assets are substantially greater in value than its entire indebtedness, and the value of said assets of the defendant exceeds the sum of Six million ($6,000,000) dollars, but the nature of said assets is such that any attempt to realize thereon at the present time would be fruitless, and any attempted sale at the present time would irreparably injure your orator and the other creditors of defendant, and no sale can be had at the present time of the property of the defendant so as to preserve the interests of its creditors except through a Receiver or Receivers to be appointed herein. At the present time there is no market for most of the assets of the defendant. Substantially all of the assets of the defendant consists of the shares of stock and of the bonds of and claims against the said operating companies. The defendant by reason of its ownership of the actual or working controlling interests in the capital stock of the said operating companies has and exercises control of the affairs, business and property of the said operating companies, and the business and affairs of the said operating companies are themselves closely related in interest, management and business affairs, and the said operating companies are largely managed as a single system to the interest and advantage mutually of the respective operating companies. The value of the respective holdings of the defendant in each of the said operating companies, which, as hereinbefore stated, exceeds the sum of Six million ($6,000,000) dollars, is further enhanced by the fact that the said properties are united in a single control, and the total value of the said holdings of the defendant when considered as united in such a single control is largely in excess of the value of the individual properties. This value will be largely lost to your Orator and to the other creditors of the defendant if the assets of the defendant are disposed of and dissipated and scattered through execution sales or otherwise, separately and not as a unit, and the sale of any of the said prop-

erties of the defendant to pay any portion of its said indebtedness will irreparably injure those creditors not paid and deprive those creditors, including your Orator, of the possibility of enforcing against the defendant and its assets such equities as they may possess. The value of defendant's holdings in the said operating companies will be greatly depreciated if the said holdings are scattered or separated as your Orator fears they will be if the relief herein prayed for is not granted.

SIXTEENTH: Your orator is informed and verily believes and therefore avers, that the accounts receivable of the defendant are based upon advances made by the defendant in the course of fostering and assisting the business and credit of the said operating companies as hereinbefore stated, and divers of the said operating companies are at the present time indebted to the defendant in large sums of money as follows: The sum of Six hundred and seventy-five thousand and sixty-three and $\frac{17}{100}$ ($675,063.17) dollars is now due from the La France Copper Company, being moneys advanced to La France Copper Company for the carrying on of its business; the further sum of One hundred and ninety six thousand one hundred and ten and $\frac{17}{100}$ ($196,110.17) dollars is at the present time due from La France Copper Company, being payments made for its account on the guaranty of the interest on La France Copper Company as aforesaid; the sum of Sixty-three thousand three hundred and fifty-three and $\frac{83}{100}$ $63,353.83) dollars is at the present time due from the Pittsburgh & New York Coal Company, being the amount of payments made for interest on mortgage, taxes, etc., on certain real property held by the said Pittsburgh & New York Coal Company; the sum of Two hundred and twelve thousand nine hundred and fifty-nine and $\frac{40}{100}$ ($212,959.40) dollars is at the present time due from the Basin Reduction Company, being the amounts advanced to the said Basin Reduction Company for the operation of its business; the sum of One million two hundred and forty-four thousand one hundred and forty-three and $\frac{9}{100}$ ($1,244,143.09) dollars is at the present time due from the Montana Ore Purchasing Company, being the amounts advanced to it in cash for its business. In additfon to the sums hereinbefore mentioned, there is due to the defendant from divers

other persons and corporations the sum of Two hundred thousand ($200,000) dollars. Substantially none of the said indebtedness is collectible at the present time. The claim of the defendant against La France Copper Company has been duly presented and filed in the bankruptcy proceedings as aforesaid, but as your Orator is informed and verily believes and therefore avers, no dividend will be declared or paid in the said proceedings greater than ten per cent. (10%) of the debts of the said La France Copper Company.

SEVENTEENTH : Your Orator is informed and verily believes and therefore avers, that the defendant has less than One thousand ($1,000) dollars in cash on hand and in banks, and has absolutely no means at the present time for procuring any funds.

EIGHTEENTH : Your Orator is informed and verily believes and therefore avers that the defendant has been obliged to suspend its ordinary business by reason of the fact that it has failed to pay to the State of New Jersey the taxes due to the said State of New Jersey amounting annually to the sum of Six thousand two hundred and fifty ($6,250) dollars for each of the years 1909, 1910 and 1911, in consequence whereof the charter of the defendant was, on or about the 28th day of February, 1912, forfeited pursuant to law for the said nonpayment of taxes. As a result of such forfeiture the defendant is without any power whatever to create new obligations, and consequently without the power to borrow money or to secure any loans whatsoever even for the purpose of paying its secured indebtedness and thereby of redeeming its assets from the liens already existing thereon.

NINETEENTH : By reason of the foregoing facts, your Orator is without any direct remedy at law and any proceeding at law known to your Orator to realize upon defendant's debt would not at the present time enable your Orator to obtain the payment of his debt nor to obtain any substantial relief.

TWENTIETH : Your Orator fears that, unless the relief herein prayed for is granted, the said secured creditors will foreclose their liens upon the respective securities and properties of the defendant held by them, and that thereby the chief items of assets of the defendant may be lost unto it and unto your Orator and unto the other unsecured creditors of the defend-

ant, and your Orator is informed and verily believes and therefore avers that any forced sale of the said pledged or mortgaged securities or properties of the defendant will cause irraparable injury to your Orator and to the other unsecured creditors of the defendant.

TWENTY-FIRST: Your Orator is informed and verily believes and therefore avers, that the assets of the defendant are subject not only to judgments and executions in suits brought against the defendants by creditors in all jurisdictions where the said property is located, but are also subject to attachment in said jurisdictions at the suit of the said creditors: and as hereinbefore stated, various suits have already been commenced against the said defendant by divers of its said creditors. Your Orator is informed and verily believes and therefore avers that the creditors of the defendant are numerous and scattered among many states and cities throughout the United States. Unless the relief herein prayed for is granted, and unless the assets of the defendant are administered by a Court of Equity, and all actions and proceedings at law, including executions and writs of attachments and other processes, are enjoined, your Orator fears that the defendant will be subject to additional vexatious and costly litigations in many jurisdictions, and that the assets of the defendant will be sold at forced sales in which event they will bring less than their fair and reasonable value and irreparable injury will be done to your Orator and to all the other creditors of the defendant. The intervention of this Court is therefore necessary for the protection of the said creditors to the end that the property of the defendant may not be dissipated by a multiplicity of suits brought in the different states to the detriment of the interests of the great body of the creditors of the defendant.

TWENTY-SECOND: Your Orator is informed and verily believes and therefore avers, that in order to preserve the assets of the defendant, both those which have been pledged and those not pledged, and in order that the rights of your Orator and of all other creditors of the defendant may be protected and equitably adjudicated and apportioned, it is necessary that a receiver or receivers be appointed herein, and that such receivers be given full power as more fully stated

hereinafter. Unless this Honorable Court shall issue and grant an injunction and appoint a receiver or receivers to take charge of all the assets of the defendant, and in its discretion direct and authorize the said Receiver to borrow money sufficient to pay off the said secured indebtedness and redeem thereby the said assets of the defendant as hereinbefore set forth, or to take such other action as to this Court shall seem just and proper, your Orator and all the other creditors of the defendant will be totally divested of their rights and the value of the properties of the defendant will be consumed and destroyed by the sale thereof to satisfy the said unsecured indebtedness.

TWENTY-THIRD: Your Orator is informed and verily believes and therefore avers that the Montana Ore Purchasing Company is a corporation organized under the laws of the State of Montana. All of the stock of said Company is owned by the defendant. The ownership by the defendant of other stocks of other companies above referred to is, in many instances, through the medium of ownership by the Montana Ore Purchasing Company; to wit, the Montana Ore Purchasing Company, all of the stock of which is as aforesaid, owned by the defendant company, in turn owns stock in some of the other corporations named in this Bill of Complaint. The affairs and assets of the defendant company and the Montana Ore Purchasing Company are, and have for a long time past been, closely interwoven, and in many instances are intimately intermingled, and have in many instances been treated for purposes of convenience, as though the defendant were the owner of all the properties technically held by the Montana Ore Purchasing Company. Through the course of conduct in connection with the business and affairs of the defendant company and of the Montana Ore Purchasing Company, the relations of the two companies are so interwoven and their affairs have been so closely identified and are so unified as to be incapable of severance. The Montana Ore Purchasing Company has had no meeting of directors or stockholders for several years past, but the directors of the defendant company have managed and controlled the affairs and properties of the Montana Ore Purchasing Company the same as if its assets and affairs were those of the defendant.

Debts have been incurred by the defendant company and the Montana Ore Purchasing Company each for the benefit of the other and the inter-company relations between the two said companies are most involved and intricate and difficult of ascertainment. Assets of the two companies have in many instances been employed and treated as if they were the assets of the defendant, in consequence of which the affairs and assets of the said two companies are hopelessly intermingled, as aforesaid.

TWENTY-FOURTH: This suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

TWENTY-FIFTH: The principal executive office of the defendant from which the business and affairs of the defendant are administered and where the general officers of said defendant have their offices and the meetings of the Board of Directors of said defendant are held, is in the Borough of Manhattan, City, County and State of New York, in the Southern District of New York, and substantially all of the personal property of the defendant now in its possession is situated, located and held at the said office in the Borough of Manhattan, City, County and State of New York.

IN CONSIDERATION WHEREOF, and inasmuch as your Orator is remediless in the premises at and by the strict rules of common law, and is relievable only in a Court of Equity, and by a suit of this nature where matters of this nature are properly cognizable and relievable, your Orator prays

1. That this Honorable Court will administer all and singular the properties, rights and business belonging to the defendant, and will adjudicate, enforce, adjust and determine the rights, liens, equities and claims of all creditors of the defendant, including the claim of your Orator.

2. That this Honorable Court will forthwith appoint a Receiver or Receivers of all and singular the property of the defendant of whatsoever nature, including all stocks, bond and other securities, and all other properties of the defendant, with full power to take into their possession, hold and manage the same under the direction of this Court with such powers as this Court may from time to time grant; to secure such loans as may be necessary or advisable in connection with the administration

of the assets of the defendant or with the redemption of pledged or mortgaged property and to incur such expenses as may be necessary or advisable in the admistration of their trust, and to issue such Receivers' certificates as they may deem advisable, on such terms and conditions as they may deem proper and necessary, and to pledge any and all assets of the defendant to secure the repayment of any and all of such Receivers' certificates; to bring suit for, collect, receive and take into their possession all the property and assets, real, personal or mixed, of the defendant, including books, records, vouchers, checks, moneys, stocks, bonds, securities, real estate, and all other property, real, personal or mixed; to institute, prosecute, become parties to, intervent in, compromise of defend any actions at law or in equity or under any statute for the recovery, protection or maintenance of any of the assets, or properties of the defendant as they may deem necessary or proper, including the institution and prosecution of any such ancillary proceedings as they may deem advisable; to settle, collect, compound, adjust or make allowance upon any debts that may be due or owing to the defendant as they may deem proper; to pay any such claims for wages or otherwise as may have priority; and in general with all the usual powers of Receivers in such cases.

3. That the officers, managers, employees, creditors and stockholders of the defendant company, and all other persons, firms and corporations, including marshals, sheriffs, deputies and their servants and agents, be required forthwith to transfer, convey and deliver up to such Receivers possession of all property of the defendant wheresoever situate; and

4. That all persons, firms and corporations, including marshals, sheriffs, constables, deputies and their servants and agents and all other officers of the defendant, be enjoined from instituting, commencing or prosecuting or continuing the prosecution of any actions, suits or proceedings, at law or in equity, or under any statute, against the defendant, and from levying or serving any attachments, executions or other processes upon the defendant or upon or against any of the property of the said defendant, and generally that all persons, firms and corporations be enjoined from doing any act to interfere with said

Receivers in their possession of the property of the defendant.

5. That a writ of injunction issue out of and under the seal of this Honorable Court, or issue by one of your Honors, directing, enjoining and restraining the defendant and its officers, agents and directors, and all other persons, including creditors, stockholders, sheriffs, marshals, constables, deputies and their servants and agents, from interfering with, transferring, selling or disposing of any of the property of the said defendant.

6. That this Honorable Court will grant unto your Orator a writ of subpœna of the United States of America, issued out of and under the seal of this Honorable Court, directed to the defendant and commanding it on a day certain therein to be named, under a certain penalty, before this Honorable Court to answer (but not under oath, answer by oath being expressly waived) of and in the premises, and to stand by, perform and abide by such orders and decrees as may be made by this Honorable Court.

7. That at such time as may be found just and proper the properties of the defendant may be ordered to be sold in whole or in part, for cash or on credit, in such manner and upon such terms and conditions in any nature whatsoever as this Court may deem just and equitable, and that any such order of sale shall make proper and suitable provision for the preservation of all equities, rights, priorities, claims and liens of all creditors, and shall provide for the sale of the property of the defendant, subject to or free of liens and incumbrances in whole or in part, as this Court may direct, and that the proceeds of any such sale be distributed among those entitled thereto, as this Honorable Court shall adjudicate, or that the properties of the defendant in whole or in part may be returned to it, and that your orator may have such other and further relief in the premises as may be just and equitable, and that the defendant may be directed to make such bills of sale, assignments, transfer and conveyances of any such property as may be directed to be sold by this Court.

8. That such order shall be made by this Honorable Court as to the service of this Bill of Complaint and of any order that may be made in this suit as may be deemed sufficient and proper by this Court.

9. That your orator may have such other and further relief as may be just and proper.

And your Orator will ever pray.

MAURICE DEICHES,
As Receiver of The Ætna Indemnity Company, Complainant.

T. TILESTON WELLS,
Solicitor.

STATE OF NEW YORK, }
County of New York, } ss. :

MAURICE DEICHES, being duly sworn, deposes and says that he is the complainant in the foregoing Bill of Complaint; that he has read the same and the matters and things therein set forth, and the same are true to the best of his knowledge and belief.

MAURICE DEICHES.

Sworn to before me this 10th day of February, 1913.

GEORGE H. FITZGERALD,
(Notarial Seal) Notary Public, No. 107,
Kings Co.,
Cert. filed in N. Y. Co.

A copy.

ALEX. GILCHRIST, JR.,
(L. S.) Clerk.

"Exhibit B."

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

MAURICE DEICHES, as Receiver of The Aetna Indemnity Company,
Complainant,

AGAINST

UNITED COPPER COMPANY,
Defendant.

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

Now comes the above named defendant by its attorneys and solicitors, Stanchfield & Levy, and for answer to the bill of complaint herein, or so much thereof as defendant is advised that it is material or necessary for him to answer, says:

FIRST: The allegations, and each of them, contained in said bill of complaint are true.

SECOND: The defendant consents to the relief prayed for in the said complaint.

Dated, New York, February 10th, 1913.

STANCHFIELD & LEVY,
Attys. & Solicitors for Defendant,
Office & Post Office Address,
No. 11 Pine Street,
Borough of Manhattan,
New York City.

LOUIS S. LEVY,
of Counsel.

(A copy.)
ALEX. GILCHRIST, JR.,
(SEAL) Clerk.

"Exhibit C."

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

MAURICE DEICHES, as Receiver of The Aetna Indemnity Company, Complainant,

AGAINST

UNITED COPPER COMPANY, Defendant.

And now, on this 10 day of February, 1913, this cause came on to be heard upon the bill of complaint and the answer of the defendant this day filed, admitting the allegations of the bill and consenting to the making of the decree; upon consideration whereof, it is

ADJUDGED AND DECREED that the defendant company, though having assets and properties greater in value than its debts, is now unable to meet its matured and maturing indebtedness and will not, for a considerable time to come, be able to meet the same, or any substantial portion thereof at maturity; that the complainant and other creditors of the defendant are without adequate remedy at law, that the complainant is now entitled to the relief hereby granted; and that it is necessary for the protection and preservation of the respective rights and equities of the complainant and of the other creditors of the defendant that the properties of the defendant should be administered in this suit through receivers to be appointed by this Court, with the powers herein conferred upon them, and it is further

ORDERED, ADJUDGED AND DECREED as follows:

That John S. Sheppard, Jr., of the City of New York, and Addison E. Cudworth, of Londonderry, Vermont, be

and they hereby are appointed receivers of the defendant, United Copper Company, and of all the properties owned by the defendant, or in which the said defendant has any ownership or interest, whether such property be real, personal or mixed, of whatsoever kind and description, and wheresoever situated, including all lands, real estate, buildings, premises, property and appurtenances, owned, controlled, leased or operated by the said defendant, and all offices, furniture, fixtures, books of account, records and other books, papers and accounts, cash on hand or in bank or on deposit, things in action, credits, stocks, bonds, securities, shares of stock in the corporations described in said bill of complaint, and all shares of stock, certificates of equitable interest and other certificates representing any interest in any property and all other securities of whatsoever character owned by the defendant company, on or in which it has any interest, or which it controls directly or indirectly, deeds, leases, contracts, muniments of title, bills and accounts receivable, rents, issues, profits, tolls and income accruing and to accrue, as well as all interest, easements, privileges, franchises and appurtenances, and all assets and property of every kind, character and description whatsoever; with full authority immediately to take possession of and, until the further order of this Court, to carry on, manage and operate the said properties and to continue the business of the said defendant in their discretion, until the further order of this Court, and to exercise the authority and franchises of the said defendant, to preserve and protect its properties in proper condition and repair, and to perfect the title and possession in and to said properties, and in their discretion to employ and discharge and fix the compensation of all such officers, managers, agents and employees as may be necessary for the proper discharge of their duties as such receivers and to make such payments and disbursement as may be needful or proper in so doing; to purchase, for cash or on credit, such supplies, materials or other property as may be necessary or advisable in connection with the administration of the property and assets of the defendant; to sell the properties of the defendant, either for cash or on credit, as may be usual or advisable in the business of the said defendant or otherwise; to collect and receive the rents, income, tolls and profits of the property of the defendant; to make, subject to and upon the

granting of further orders of this Court, such appropriate payments for and on account of accruing taxes, assessments, interest on mortgages, insurance, ground rents or other necessary charges as may be expedient or requisite to preserve the properties and assets of the defendant, and subject to and upon the granting of such orders, to pay and discharge any current obligations for labor and like charges as may be decreed by this Court to be entitled to priority. It is further

ORDERED that said receivers be and they hereby are authorized and empowered to institute and prosecute, defend, compromise or adjust, intervene in or become parties to such suits, and proceedings, at law, or in equity, including ancillary proceedings in State or Federal Courts, as may in their judgment be necessary or proper for the protection, maintenance and preservation of the property and assets of the defendant, and likewise to defend all suits, actions and proceedings instituted against them as receivers, or against said defendant, and also to appear in and conduct the prosecution or defense of any suits or adjust or compromise actions or proceedings now pending in any court by or against the said defendant, the prosecution, compromise or defense of which will in the judgment of said receivers be advisable and proper for the protection of the property placed in their charge or of the interests and rights of creditors and stockholders connected therewith; and generally to all acts and things necessary or proper to be done to protect, maintain and preserve the properties of which they are hereby appointed receivers for the benefit of the creditors and stockholders of the defendant, with leave to apply from time to time, whenever necessary, and as they may be advised, for further orders from this Court touching all and singular their rights and duties in the premises. Said receivers are further authorized to settle with, compromise or adjust, collect from or make allowance to debtors of the defendant, and generally to do such things and enter into such arrangements, compositions, extensions or otherwise with debtors of the defendant as they, the said receivers, may deem advisable. It is further

ORDERED, that the several bonds of each of the said receivers in the sum of Fifty Thousand Dollars, conditioned that he will well and truly perform the duties of his office and duly account for all moneys and property which may come

into his hands, and abide by and perform all things which they shall be directed to do, with sufficient sureties to be approved by a Judge of this Court, be forthwith filed with the Clerk of the Court. It is further

ORDERED AND DECREED, that the defendant, and each and every of its officers, directors, agents and employees, and all other persons, including creditors and stockholders of the defendant, be and they hereby are required and commanded forthwith upon demand of the said receivers, or their duly authorized agent or agents, to turn over and deliver, to said receivers, or their duly constituted representatives, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys and all other properties of or controlled by the defendant, real or personal, in his or their possession or control. It is further

ORDERED AND DECREED that the said defendant, and each and every of its officers, directors, agents and employees, and all other persons claiming to act by, through, under or for said defendant, and all other persons, firms and corporations, including creditors and stockholders of the defendant, and including all sheriffs, marshals, constables, and their agents and deputies, and all other officers, are hereby enjoined and restrained from removing, transferring, disposing of, or attempting in any way to remove, transfer or dispose of, or in any way interfere with any of the properties, assets or effects owned by, or in the possession of, the said defendant, and all said persons, firms and corporations are hereby enjoined from doing any act whatsoever to interfere with the possession and management by said receivers of any of the properties of the said defendant, or from in any way interfering with said receivers in the discharge of their duties, or from doing any act to interfere with the administration and disposition in this proceeding of the affairs and assets of the defendant, and all creditors and stockholders of the said defendant, and all other persons, firms and corporations are hereby enjoined from instituting or prosecuting or continuing the prosecution of any pending actions, suits or proceedings at law or in equity, or under any statute, against the said defendant, and from levying any attachments, executions or other process upon or against any of the prop-

erties of said defendant, or from taking or attempting to take into their possession any of the said properties of the said defendant, and from issuing or causing the execution or issuance out of any Court of any writ, process, summons, subpœna, replevin, attachment, or any other proceedings for the purpose of impounding or taking possession of any of the property of the said defendant. It is further

ORDERED, that the said receivers be and they hereby are directed, within ten days from the date hereof, to mail to each and every creditor of the defendant, known to the said receivers, or either of them, a copy of this order and of the bill of complaint herein; such mailing to be in a securely sealed envelope, postage prepaid, and to be addressed to the said creditors of the defendant at the last post office address known to said receivers, and such service by mail is hereby decreed to be due, timely, sufficient and complete service of notice of this order and this suit and all proceedings had and to be had herein upon all such creditors for all purposes. And it is further

ORDERED, that all such creditors of the said defendant, and each and every of them, be and they hereby are directed to file with the receivers at such office or place of business as said receivers may designate and within ninety (90) days from the date of this order, a duly sworn statement of all and any such claims as they may have or assert against the defendant. Such statement shall be verified before any officer authorized to administer oaths by the laws of the state where said claim is verified, and such statement of claim shall, where the same is evidenced by any written instrument, have the same attached to it. And it is further

ORDERED, that notice shall be published of the time and place for the filing of the said claims, the form of such notice and the times and places of such publication to be fixed hereafter by this Court on application of said receivers. And it is further

ORDERED that all such creditors as shall fail to file their claims with the receivers, as hereinbefore provided, and within the time hereinbefore fixed, shall be debarred from any share of, in or to the property of the defendant, and shall not be en-

titled to receive any share of said assets or property of the defendant, or the proceeds thereof. And it is further

ORDERED that the said receivers shall, on the 15th day of April, 1913, at 11 o'clock in the forenoon, report in the Post Office Building, Borough of Manhattan, City of New York, to the undersigned Judge of this Court as to the affairs, assets, debts and business of the defendant, and at such hearing all and any such matters as to the administration, disposition and sale of the assets and the affairs of the defendant, and as to the continuance of the business of the defendant, and as to all or any of the matters alleged and as to any relief prayed for in said bill of complaint as may be presented by any parties in interest will be considered, and such further orders and decrees will be made in respect of any of the said matters, at such hearing or any adjournments thereof, as to this Court shall seem proper and equitable.

Dated: February 10th, 1913.

JAMES L. MARTIN,
(SEAL) United States District Judge.

A copy,
ALEX. GILCHRIST, JR.,
Clerk.

I hereby certify that the Receivers' bonds required by this order have been approved and filed.

ALEX. GILCHRIST, JR.,
(SEAL) Clerk.

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF NEW JERSEY.

MAURICE DEICHES, as Receiver of The Aetna Indemnity Company,
Complainant,

AGAINST

UNITED COPPER COMPANY,
Defendant.

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

NOW COMES the above named defendant by its attorneys and solicitors, Charles F. McKinney and for answer to the bill of complaint herein, or so much thereof as defendant is advised that it is material or necessary for him to answer, says :—

FIRST: The allegations, and each of them, contained in said bill of complaint are true.

SECOND: The defendant consents to the relief prayed for in the said complaint.

Dated 14th February, 1913.

CHARLES F. McKINNEY,
No. 828 Prudential Bldg.,
Newark, N. J.
Solicitor.

STANCHFIELD & LEVY,
Of Counsel.

[ENDORSED]: U. S. District Court,—Maurice Deiches, Receiver vs. United Copper Co.,—Answer—Chas. F. McKinney, Solr. Filed Feby. 14, 1913, George T. Cranmer, Clerk.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW JERSEY.

MAURICE DEICHES, as Receiver of The Aetna Indemnity Company,
Complainant,

AGAINST

UNITED COPPER COMPANY,
Defendant.

And now, on this 14th day of February, 1913, this cause came on to be heard upon the bill of complaint and the answer of the defendant this day filed, admitting the allegations of the bill and consenting to the relief therein prayed for; and it appearing that John S. Sheppard, Jr., of the City, County and State of New York, and Addison E. Cudworth, of Londonderry, Vermont, have been duly appointed receivers of the defendant, United Copper Company, and of all the property thereof, and have been vested with certain powers as such receivers, as more fully appears from the decree of the United States District Court for the Southern District of New York a copy of which is annexed to the bill of complaint herein marked Exhibit C; upon consideration whereof, it is

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

That John S. Sheppard, Jr., of the City, County and State of New York, and Addison E. Cudworth, of Londondery, Vermont, and Frederick L. Johnson, of Newark, this state, be and they hereby are, appointed ancillary receivers of the defendant, United Copper Company, and of all the properties owned by the defendant or in which the said defendant has any ownership or interest, whether such property be real, personal or mixed, of whatsoever kind and description, situated within the District and State of New Jersey with like powers as those granted by the decree of the United

States District Court for the Southern District of New York, of which decree a certified copy is annexed to said complaint herein and marked Exhibit C. And it is further

ORDERED AND DECREED, that the defendant, and each and every of its officers, directors, agents and employees, and all other persons, including creditors and stockholders of the defendant, be, and they hereby are, required and commanded forthwith upon demand of the said ancillary receivers, or their duly authorized agent or agents, to turn over and deliver, to said ancillary receivers, or their duly constituted representatives any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys and all other properties of or controlled by the defendant, real or personal, in his or their possession or control. It is further

Ordered and decreed, that the said defendant, and each and every of its officers, directors, agents and employees, and all other persons claiming to act by, through, under or for said defendant, and all other persons, firms and corporations, including creditors and stockholders of the defendant, and including all sheriffs, marshals, constables, and their agents and deputies, and all other officers, are hereby enjoined and restrained from removing, transferring, disposing of, or attempting in any way to remove, transfer or dispose of, or in any way interfere with any of the properties, assets or effects owned by, or in possession of, the said defendant, and all said persons, firms and corporations are hereby enjoined from doing any act whatsoever to interfere with the possession and management by said ancillary receivers of any of the properties of the said defendant, or from in any way interfering with said ancillary receivers in the discharge of their duties, or from doing any act to interfere with the administration and disposition of the affairs and assets of the defendant, by the said ancillary receivers, and all creditors and stockholders of the said defendant and all other firms, persons and corporations are hereby enjoined from instituting, commencing or prosecuting any actions, suits or proceedings, at law or in equity, or under any statute, and from continuing the prosecution of or taking any further steps in any pending actions, suits or proceedings, at law or in equity or under any statute, against the defendant, and from levying any attachments, executions or other process upon or against any of the properties of the said defend-

ant, or from taking or attempting to take into their possession any of the said properties of the said defendant, and from issuing or causing the execution or issuance out of any court of any writ, process, summons, subpœna, replevin, attachment, or any other proceedings for the purpose of impounding or taking possession of any of the property of the said defendant. It is further

ORDERED, that the said ancillary receivers be, and they hereby are authorized to take possession of any and all safe deposit vaults and other security boxes of the United Copper Company, the defendant herein, situated within the State and District of New Jersey, and to open, or cause the same to be opened, and take into their possession the contents thereof. It is further

ORDERED, that the said receivers give bond as said ancillary receivers in the sum of ten thousand dollars, conditioned that they will well and truly perform the duties of their office and duly account for all moneys and property which may come into their hands as such ancillary receivers and abide by and perform all things which they shall be directed to do, with sufficient sureties to be approved by a Judge of this Court, be forthwith filed with the Clerk of this Court.

And said ancillary receivers are hereby directed that immediately upon opening the vault of the said United Copper Company in the Hudson Trust Co. in Hoboken, N. J., they shall forthwith lay before this Court and file herein a statement of the contents of the said vault and are further required to file an inventory of the property of the said company in their hands as ancillary receivers as aforesaid within thirty days from the date hereof.

Dated February 14th, 1913.

JOHN RELLSTAB,
U. S. District Judge.

[ENDORSED:] United States District Court for the District of New Jersey. Maurice Deiches, as Receiver of The Aetna Indemnity Company, Complainant, against United Copper Company, Defendant. Order filed February 14, 1913.

DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF NEW JERSEY.

MAURICE DEICHES, as Receiver of the Aetna Indemnity Company,
Complainant,

AGAINST

UNITED COPPER COMPANY,
Defendant.

KNOW ALL MEN BY THESE PRESENTS, that John S. Sheppard, Jr., of No. 27 Cedar Street, Borough of Manhattan, City of New York, Addison E. Cudworth, of Londonderry, Vermont, and Frederick L. Johnson, of Newark, N. J., as Principals and National Surety Company, a corporation under the laws of the State of New York, as Surety, are held and firmly bound unto the United States of America, in the penal sum of Ten thousand ($10,000.00) Dollars, lawful money of the United States of America, to be paid to the said United States of America, for the payment of which, well and truly to be made, said Principals and Surety hereby bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, by an order made by one of the Judges of the above named Court, on the 14th day of February, 1913, the above named John S. Sheppard, Jr., Addison E. Cudworth and Frederick L. Johnson were appointed Ancillary Receivers of the above named Defendant, and of all its property and assets in the State of New Jersey, as more particularly set forth in said order, with the authority and powers specifically set forth in said order, and the said John S. Sheppard, Jr., Addison E. Cudworth and Frederick L. Johnson were directed to file with the Clerk of said Court their bond in the form and amount of this instrument.

NOW, THEREFORE, the condition of this instrument is such, That if the above named John S. Sheppard, Jr., Addison E. Cudworth and Frederick L. Johnson will well and truly perform the duties of their office as Ancillary Receivers aforesaid, and will duly account for all moneys and property which may come into their hands, as such ancillary receivers, and abide by and perform all things which they shall be directed to do by any court of competent jurisdiction then this obligation to be void ; otherwise to be and remain in full force and effect.

Dated, New York, this 15th day of February, 1913.

JOHN S. SHEPPARD, JR., (L. S.)
ADDISON E. CUDWORTH, (L. S.)
FREDERICK L. JOHNSON. (L. S.)

(L. S.) NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Resident Vice-President.

Attest:
E. M. MCCARTHY,
Resident Asst. Secy.

Approved Feby. 17, 1913.
JOHN RELLSTAB,
Judge.

STATE OF NEW YORK, } ss. :
County of New York, }

On the 15th day of February, 1913, before me personally appeared John S. Sheppard, Jr., to me known and known to me to be the individual mentioned and described in the foregoing instrument, and he duly acknowledged to me that he executed the same.

JOHN J. LANE,
Commissioner of Deeds in and for the
City of New York, No. 43.

STATE OF NEW YORK, } ss. :
County of New York, }

On the 15 day of February, 1913 before me personally appeared Addison E. Cudworth, to me known, and known to me to be the individual mentioned and described in the foregoing instrument, and he duly acknowledged to me that he exccuted the same.

JOHN J. LANE,
Commissioner of Deeds in and for the City of New York No. 43.

STATE OF NEW JERSEY, } ss. :
County of Essex, }

On the 15th day of February, 1913, before me personally appeared Frederick L. Johnson, to me known, and known to me to be the individual mentioned and described in the foregoing instrument, and he duly acknowledged to me that he executed the same.

HORACE E. GRICE, (L. S.)
Notary Public,
and Master in Chancery of New Jersey.

AFFIDAVIT, ACKNOWLEDGMENT AND JUSTIFICATION BY GUARANTEE OR SURETY COMPANY.

STATE OF NEW YORK, }
County of New York, } ss. :

On this 15th day of February, one thousand nine hundred and Thirteen, before me personally came Wm. A. Thompson, known to me to be the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of John S. Sheppard, Jr., Addison E. Cudworth and Frederick S. Johnson, as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Com-

pany, and knows the corporate seal thereof; that the said National Surety Company, is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894, that the seal affixed to the within Bond of John S. Sheppard, Jr., Addison E. Cudworth and Frederick L. Johnson, is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Resident Vice-President of said Company, and that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said E. M. McCarthy subscribed to said bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its debts and liabilities of every nature whatsoever, by more than the sum of Three Million ($3,000,000.00) dollars.

That E. A. Armstrong of Camden, N. J., is our agent to acknowledge service in the Judicial District wherein this bond is given.

WM. A. THOMPSON.

Sworn to, acknowledged before me, and subscribed in my presence this 15th day of February, 1913.

M. L. EMMEIT,
Notary Public for Kings County No ____,
Certificate filed in New York County No.____.
Queens Richmond and Westchester Counties,
Kings County Register's Office No.____,
New York County Register's Office No. 4009.

[ENDORSED:] United States District Court, District of New Jersey—Maurice Deiches, as Receiver of The Aetna Indemnity Co., v. United Copper Co.—Bond.—Filed Feb. 17, 1913, George T. Cranmer, Clerk.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

MAURICE DEICHES, as Receiver of The Aetna Indemnity Company, Complainant, vs. UNITED COPPER COMPANY, Defendant.	On Bill for Receiver. Receiver's Oath.

UNITED STATES OF AMERICA, District of New Jersey, } ss. :

I, FREDERIC L. JOHNSON, do swear that I will faithfully, honestly and impartially execute the powers and trusts reposed in me as one of the receivers for the creditors and stockholders of United Copper Company, and that without favor or affection.

FREDERIC L. JOHNSON.

Subscribed and sworn to before me this 17th day of February, 1913.

ALGERNON T. SWEENEY,
Notary Public in New Jersey.

(L. S.)

[ENDORSED :]—United States District Court of New Jersey.—Maurice Deiches, as Receiver of The Aetna Indemnity Company, vs. United Copper Company.—Oath of Receiver.—Filed Feby. 18, 1913, George T. Cranmer, Clerk.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

MAURICE DEICHES, as Receiver of The Ætna Indemnity Company, Complainant, AGAINST UNITED COPPER COMPANY, Defendant.	On Bill of Receiver. Receiver's Oath.

UNITED STATES OF AMERICA, Western District of North Carolina, } ss. :

I, JOHN S. SHEPPARD, JR, do swear that I will faithfully, honestly and impartially execute the affairs and trusts reposed in me as one of the Receivers for the creditors and stockholders of United Copper Company and that without favor or affection.

JOHN S. SHEPPARD, JR.

Subscribed and sworn to before me this 19th day of February, 1913.

J. HARDY LEE,
(L. S.) Notary Public.
My commission Expires Nov. 1st, 1913.

[ENDORSED :]—U. S. District Court, District of New Jersey. —Maurice Deiches vs. United Copper Company.—Receiver's Oath.—Filed February 21, 1913, George T. Cranmer, Clerk.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

MAURICE DEICHES, as Receiver of The Aetna Indemnity Company, Complainant, AGAINST UNITED COPPER COMPANY, Defendant.	On Bill for Receiver. Receiver's Oath.

UNITED STATES OF AMERICA, Southern District of New York, } ss:

I, ADDISON E. CUDWORTH, do swear that I will faithfully, honestly and impartially execute the affairs and trusts reposed in me as one of the Receivers for the creditors and stockholders of United Copper Company and that without favor or affection.

ADDISON E. CUDWORTH.

Subscribed and sworn to before me this 17th day of February, 1913.

GEORGE W. FREY,
Notary Public No. 76,
New York County.

(L. S.)

STATE OF NEW YORK, County of New York, } ss.:

I, WILLIAM F. SCHNEIDER, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, Do Hereby Certify That George W. Frey before whom the annexed deposition was taken, was, at the time of taking the same, a Notary

Public of New York, dwelling in said County, duly appointed and sworn, and authorized to administer oaths to be used in any Court in said State, and for general purposes; that I am well acquainted with the handwriting of said Notary, and that his signature thereto is genuine, as I verily believe.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County, the 18th day of Feby., 1913.

WM. F. SCHNEIDER,
Clerk.

(L. S.)

[ENDORSED:] United States District Court, District of New Jersey—Maurice Deiches, as Receiver of Aetna Indemnity Company vs. United Copper Company.—Oath of Addison E. Cudworth, Receiver—Filed Feb. 13, 1913, George T. Cranmer, Clerk.

UNITED STATES OF AMERICA,
District of New Jersey, } ss.:

I, GEORGE T. CRANMER, Clerk of the District Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true copy of the original Bill of Complaint, Answer, Order Appointing Ancillary Receivers, Bond of Receivers and Oaths of Receivers, on file, and now remaining among the records of said Court in my office, and I do further Certify that the above Receivers have not been discharged.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the Seal of the said Court, at Trenton, in said District, this 5th day of April, nineteen hundred and seventeen.

GEORGE T. CRANMER,
Clerk District Court, U. S.

(SEAL)

By ROBERT S. CHEVRIER,
Deputy.

Office Supreme Court, U. S.
FILED
APR 7 1917
JAMES D. MAHER
CLERK

United States Supreme Court

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,
Plaintiffs-in-Error
(Plaintiffs below),

against

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, UNITED COPPER COMPANY *et al.*,
Defendants-in-Error
(Defendants below).

October Term, 1916.
No. 208.

MOTION FOR SUBSTITUTION.

ROBERT H. McCARTER,
FERDINAND E. M. BULLOWA,
Counsel for Receivers.

ROYAL LAW PRINTING CO., 79 WALL STREET, N. Y.

United States Supreme Court

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE, Plaintiffs-in-Error (Plaintiffs below), against AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, UNITED COPPER COMPANY *et al.*, Defendants-in-Error (Defendants below).	October Term, 1916. No. 208.

MOTION FOR SUBSTITUTION.

Now comes the United Copper Company, by its Receivers, George D. Hendrickson, Esq., and Mr. Luther Martin, Jr., by their counsel, Robert H. McCarter and Ferdinand E. M. Bullowa, and moves to be substituted for the plaintiffs-in-error, upon the following petition.

ROBERT H. MCCARTER,
FERDINAND E. M. BULLOWA,
Counsel for Receivers.

Petition of Receivers.

The petition of George D. Hendrickson and Luther Martin, Jr., respectfully shows:

On or about the 1st day of March, 1917, at the City of Newark, in the State of New Jersey, by an order duly made and entered in Chancery of New Jersey, in a proceeding in which Calvin O. Geer and others were complainants, and the above named United Copper Company was defendant, George D. Hendrickson and Martin Luther, Jr., were duly appointed Receivers of the United Copper Company, as appears by said order, a copy of which is hereto annexed, marked Exhibit "A", and duly qualified as such.

On or about May 3rd, 1912, the above entitled action was duly commenced in the United States District Court for the Southern District of New York, by the above named plaintiffs against the above named defendants.

Said action was brought in behalf of the United Copper Company for damages suffered by it by reason of injury to its business and property flowing from a wrongful conspiracy and combination of the defendants other than the United Copper Company, in restraint of commerce in violation of the Sherman Act, as appears by the amended complaint in the above entitled action.

The plaintiffs were, at the time of the commencement of the action, and still are, shareholders of the United Copper Company. Demand was duly made by them upon the United Copper Company to institute the action, but it refused so to do. The United Copper Company was at the time under the control of Lucius A. Dunham, Charles W. Saacke, George Lane, Bernard C. Hughes and John B. Coates, who were not fit and proper persons to conduct the affairs of said corporation in that they disregarded the rights of the shareholders and dissipated and diverted the assets of the company, as more fully appears

by the complaint in the suit in which the Receivers were appointed as aforesaid, a copy of which is hereto annexed, marked Exhibit "B".

The United Copper Company defaulted in appearing and answering in the above entitled action by reason of its control by the persons aforesaid. The defendants appearing in the action above entitled, in which application is now made to this Honorable Court, demurred to the complaint and brought on their demurrers for argument by motion for judgment on the pleadings, pursuant to the provisions of the New York Code of Civil Procedure, upon the ground that the complaint did not state facts sufficient to constitute a cause of action and that this representative action in the right of the United Copper Company cannot be maintained at law. The said United States District Court sustained the demurrers and dismissed the complaint. The plaintiffs duly sued out a writ of error to the Circuit Court of Appeals for the Second Circuit to review said judgment. The said Circuit Court of Appeals affirmed the judgment of the said District Court. The plaintiffs thereupon duly sued out a writ of error to this Honorable Court to review said judgment of the Circuit Court of Appeals. Said writ of error is now pending and is No. 208 on the October Term, 1916, Calendar of this Honorable Court, and about to be reached for argument. The foregoing facts appear by the Transcript of Record duly filed in the office of the Clerk of this Court on July 27th, 1915, and the petition, bill of complaint and orders, copies of which are hereto annexed.

It is apparent from the opinion (Transcript of Record, folio 123) that the precise question decided by said District Court and said Circuit

Court of Appeals is that said action at law in the right of the United Copper Company is not maintainable by the shareholders, nominal plaintiffs of record, to recover damages suffered by the United Copper Company, for violation of the Sherman Act, by the defendants, and that the dismissal of the complaint was solely upon that ground, and not for insufficiency otherwise to state facts sufficient to constitute a cause of action.

The Receivers of the United Copper Company, upon diligent inquiry, are informed and believe that the facts alleged in the complaint are true, and that the United Copper Company is entitled to the damages demanded in the complaint, and that they, as its Receivers, are entitled to recover the same, and duly applied in Chancery of New Jersey, for leave to make this motion to be substituted for the plaintiffs in this action, as appears by their petition, a copy of which petition is hereto annexed, marked Exhibit "C", and obtained such leave, as appears by the order of Chancellor Walker, in Chancery of New Jersey, a copy of which order is hereto annexed, marked Exhibit "D".

The Receivers of the United Copper Company are informed by counsel learned in the law that they are entitled, as Receivers of the United Copper Company, to be substituted as plaintiffs in this action, brought by stockholders in its behalf, who were prosecuting the action in a representative capacity, in that the power of amendment to such extent is authorized by Section 914 of the Revised Statutes of the United States, as was held by this Honorable Court in Bowdler vs. Johnson, 107 U. S., 251, at p. 264, and in Gates vs. Goodloe, 101 U. S., 612, at p. 613, and that

they are entitled to be heard upon the argument of the writ of error now pending before this Honorable Court under the authority of Pendleton vs. Russell, 144 U. S., 640, at p. 644 *et seq.*

The Receivers are ready and willing to furnish a bond to secure the defendants in this action for any costs which they may recover against them, if the action be unsuccessful.

Wherefore your petitioners ask to be substituted for the plaintiffs-in-error and for leave to argue the pending writ of error, by counsel in their behalf as such receivers.

GEORGE D. HENDRICKSON,

LUTHER MARTIN, JR.,
Petitioners.

STATE OF NEW JERSEY, County of Essex, } ss.:

GEORGE D. HENDRICKSON, being duly sworn, deposes and says that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

GEORGE D. HENDRICKSON.

Sworn to before me this 4th day of April, 1917.

ANNA R. MCDERMOTT,
Notary Public N. J.

Exhibit "A".

Order Appointing Receivers of United Copper Company.

IN CHANCERY OF NEW JERSEY.

Between CALVIN O. GEER, *et als.*, Complainants, and UNITED COPPER COMPANY, Defendant.	On bill, &c. Order Appointing Receiver.

Upon opening this matter to the Court by Robert H. McCarter, of counsel with the complainants, and it appearing by the bill of complaint, and affidavit filed herein, that the charter of the United Copper Company was by proclamation issued by the Governor of the State of New Jersey declared forfeited pursuant to the laws of the State for the failure of said company to pay its franchise taxes to the State for the year 1909, and that said company thereby became dissolved; and it further being represented to the Court that the directors of the said company at the time of such dissolution were and still are unfit persons to be continued as trustees in liquidation of the affairs of said company, and that there is immediate occasion and need for the appointment of a receiver of said company, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation;

It is thereupon, on this 1st day of March, 1917, on motion of Messrs. McCarter & English, solicitors of the complainants, ORDERED that George D.

Hendrickson, Esq., and Mr. Luther Martin, Jr., be, and they are hereby appointed Receivers of the United Copper Company, with full power to take charge of the estate and effects thereof, to collect the debts and property due and belonging to the corporation, to prosecute and defend whenever necessary in the name of the corporation or otherwise, all suits necessary or proper for the purpose aforesaid, to appoint an agent or agents under them, and to do all other acts which might be done by such corporation, that may be necessary for the final settlement of its unfinished business;

And it is further ordered that said Receivers do, before entering upon the discharge of their duties, enter into bond to the Chancellor to be approved by a Special Master of this Court in the sum of Two thousand Dollars, for the faithful discharge of their duties, said bond to be enlarged if necessary from time to time when assets shall come into their hands;

And it is further ordered that said Receivers, within five days after their qualification as aforesaid, do mail to each of the directors of said United Copper Company, at the time of its dissolution as in said bill set out, a notice of an application to be made to this Court at the Chancery in the City of Newark, on Tuesday, the twentieth day of March, 1917, at 10 o'clock in the forenoon, for an order confirming their appointment herein, unless cause shall be shown to the contrary.

Application to vacate may be made on one day's notice.

Respectfully advised,

MERKITT LANE,
V. C.

Exhibit "B".

Bill of Complaint of Stockholders for Appointment of Receivers of United Copper Company.

IN CHANCERY OF NEW JERSEY.

To the Honorable EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey:

The complainants, CALVIN O. GEER, of East Orange in the County of Essex and State of New Jersey, ARTHUR P. HEINZE and RUTH NOYES HEINZE, of Great Neck, Long Island, in the State of New York, and ADA L. HEINZE, of the Borough of Manhattan, City of New York and State of New York, respectfully show that:

(1) On or about April 28, 1902, United Copper Company was organized under the corporation laws of the State of New Jersey, with an authorized capital of $80,000,000, divided into 800,000 shares of the par value of $100 each, and commenced business with a capital of $1,000 divided into 10 shares of the par value of $100 each. On or about June 7, 1902, a certificate was filed showing payment of capital stock to $50,000,000.

Complainants are the owners of over 2000 shares of preferred stock of said United Copper Company, and in excess of 46,000 shares of the common stock of said company.

(2) In the year 1909 the franchise taxes due to the State of New Jersey were assessed against said United Copper Company to a large amount, which were not paid by said corporation, and on or about February 28, 1912, said corporation having for two consecutive years neglected or

refused to pay said taxes, the charter of said United Copper Company was by proclamation issued by Woodrow Wilson, Governor of the State of New Jersey, pursuant to the laws of New Jersey, repealed, and all powers conferred by law upon said corporation declared inoperative and void. Said taxes so assessed against said company for the year 1909 have not since been paid and said corporation has not been reinstated.

(3) On the dissolution of said United Copper Company as above set forth it was, under the corporation laws of the State of New Jersey, continued a body corporate for the purpose of prosecuting and defending suits by or against it and of enabling it to settle and close its affairs, and the directors of said corporation thereupon became trustees, with full power to settle its affairs, collect its outstanding debts, sell and convey its property, and divide the moneys and other property among the stockholders after paying its debts, as far as such moneys and property enabled them so to do; with authority to sue for and recover the aforesaid debts and property.

(4) That the directors of said corporation at the time of its dissolution as aforesaid, so far as complainants can ascertain, were Lucius A. Dunham, who was also the President, then of Salt Lake City, Utah; Charles W. Saacke, who was Secretary and Treasurer, then of the City of New York; George Lane, Bernard C. Hughes and John B. Coates, all of Prescott, Arizona; Gerhard Kuhne, then and now of Leonia, in the County of Bergen, New Jersey, and W. C. Shaw, then of

(5) That said directors, who, under the

statute, became trustees for said corporation, have taken no steps whatever to settle its affairs, collect the outstanding debits, sell and convey the property of the company, and divide the moneys and property among the stockholders, and have made no efforts to pay the taxes due to the State of New Jersey from said corporation, or any other of its debts, but have wholly neglected to perform any duties whatever as such trustees.

(6) Complainants are informed and believe that assets of said United Copper Company to a large amount are due to said United Copper Company, and are collectible upon paper, efforts being made to that end; that the directors of said company who became trustees upon its dissolution are not fit and proper persons, for the reasons more fully set forth in the next paragraph, to conduct the affairs of said corporation, and cannot be depended upon to collect the outstanding assets of said corporation, and that said directors should not be continued as trustees, but that one or more persons should be appointed by this Court, as receivers of said corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to said corporation, with power to prosecute and defend in the name of said corporation, or otherwise, all suits necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other things which might be done by such corporation if in being, that might be necessary for the final settlement of its unfinished business.

(7) United Copper Company was a holding company, and had in its treasury and under its

control stocks and bonds of subsidiary companies of very great value if honestly administered. On or about August 7, 1911, said United Copper Company, by its treasurer, Charles W. Saacke, pretended to make and execute a promissory note for $1,000,000 with stocks and bonds as collateral security. The stocks and bonds so attempted to be pledged as collateral constituted the entire assets of said company at that time. By this action the directors of said company above named, acting through the said Charles W. Saacke as treasurer, attempted to dispose of all the assets of said United Copper Company for the preferential benefit of a few creditors of the company, leaving out holders of large obligations of said company in total disregard of their rights. Out of the moneys derived from said note, after the payment of a bonus of ten per cent. to Assets Realization Company, a corporation, a large part of the funds were used to pay the obligations of others, for which United Copper Company was not at all liable, and in this way a large part of the assets of said corporation were dissipated and diverted from the stockholders and the real creditors of said company. The purpose of this action was to divest the company of every asset, to pay some of its creditors and to leave other creditors entirely unprotected, and also to depreciate the value of the securities themselves which were intended to be pledged as collateral. The directors above named by their action placed out of their control the assets which were confided to their care, and thus enabled other parties who came into control through their action and with their connivance, to deplete the assets of said company and in some instances to totally destroy assets of large value.

(8) The complainants have recently learned that there are located in the State of Pennsylvania assets of United Copper Company, which, if proper action is taken promptly, can be and should be recovered for the benefit of the company. Suit will have to be commenced in the State of Pennsylvania for the recovery thereof, and unless immediate steps be taken in that direction, complainants are afraid that said assets will be lost to said company. Under the circumstances hereinabove related, the directors of said corporation are improper and unfit persons to pursue and collect such assets or indeed to act as trustees in liquidation of said company. Moreover they are so widely separated and located at such distance that it is and would be a physical impossibility to secure their action in season to institute legal proceedings in the State of Pennsylvania to recover said assets with any hope of success. This Honorable Court has made no order continuing the directors aforesaid, trustees in liquidation.

Complainants are without adequate remedy in the courts of law and therefore pray:

(1) That United Copper Company, which is the defendant to this suit, may answer this bill of complaint, without oath, and each statement therein made.

(2) That a receiver or receivers may be appointed, according to the form of the statute in such case made and provided, with all the powers given by the Act of the Legislature of the State of New Jersey entitled "An Act Concerning Corporations (Revision of 1896), with

the amendments and supplements thereto, and that the assets of said corporation and the rights of complainants and other stockholders and creditors of said company may be ascertained, and that the Court will fully administer the entire assets of said corporation.

(3) That a restraining order may issue out of and under the seal of this Honorable Court, to be directed to said United Copper Company, its officers, servants and agents, enjoining and restraining them and each of them from exercising any of the privileges or franchises granted to said company, and from collecting or receiving any debts due to said corporation, and from paying out, selling, assigning or transferring any of the estate, moneys, funds, lands, tenements or effects of said corporation.

(4) That a writ of subpoena may issue, commanding said company to answer this bill of complaint, and to abide by such decree as this Court may make in the premises.

McCARTER & ENGLISH,
Solicitors for and of counsel with complainants.

STATE OF NEW JERSEY, }
County of Hudson, } *ss.:*

ARTHUR P. HEINZE, of full age, being duly sworn according to law, on his oath says:

I am one of the complainants in the foregoing bill of complaint, and am familiar with the facts set forth therein.

The United Copper Company was organized under the corporation laws of New Jersey, as set forth in the bill of complaint, and on or about June 7th, 1902, a certificate was filed showing the payment of capital stock to amount of $50,000,000. Complainants hold in the aggregate over 2000 shares of preferred stock of said company, and in excess of 46,000 shares of the common stock of said company. The said company failed to pay its taxes in 1909, and on or about February 28, 1912, a proclamation was issued by Hon. Woodrow Wilson, then Governor of the State of New Jersey, in and by which the charter of said company was repealed, and all powers conferred by law upon it declared inoperative and void. Nothing has been done since that time to have the company reinstated and the taxes so assessed against it for the year 1909 have not been paid.

The names of the directors of said company at the time of its dissolution, so far as I have been able to ascertain, were as stated in paragraph 4 of the bill of complaint. I have made efforts in various directions to make sure as to who were directors at that time and so far as I can learn all are embraced in said statement in said paragraph.

Since the dissolution of said corporation the said directors, who became trustees under the statute, have not taken any steps whatever to settle its affairs, collect its debts, sell and convey the property of the company, and distribute

same among the stockholders, and have made no efforts to pay the taxes due to the State of New Jersey, or any other of its debts, but have wholly neglected to perform their duties as such trustees.

I was one of the organizers of United Copper Company, at one time its Vice-President and a director until 1908.

In the summer of 1911 some of the men who had been active officers and directors of said company resigned and others were appointed or elected in their stead. After this had been done the directors then in office, acting through one Charles W. Saacke, who was made Treasurer, pretended to execute a promissory note to Assets Realization Company for the sum of $1,000,000, a copy of which is attached to the foregoing bill of complaint. In connection with this note there was an attempted assignment as collateral of all the assets of said company and in this way the acting directors attempted to dispose of all the assets of the company for the benefit of some creditors for the payment of claims on which the company was not liable at all with the knowledge of said Saacke, the effect of which was to deplete the assets of the company, leave some creditors unpaid and nothing for the stockholders. So far as I know and to the best of my belief not one of the directors of the company at that time, who are named in the bill of complaint, had any beneficial interest in said company. They were simply clerks and were used to accomplish the purpose above mentioned.

ARTHUR P. HEINZE.

Subscribed and sworn to before me
this 28th day of February, 1917.

MEYER EICHMANN,
Master of Chancery
of New Jersey.

Exhibit "A" Annexed to the Foregoing Bill of Complaint.

$1,000,000. New York, August 7th, 1911.

On or before February 7th, 1912, for value received, UNITED COPPER COMPANY promises to pay to any holder or holders hereof, or order, at the office of ASSETS REALIZATION COMPANY, Lafayette Building, Philadelphia, Pa., One Million Dollars ($1,000,000) in gold coin of the United States of the present standard of weight and fineness, with interest thereon at the rate of six per cent (6%) per annum, having deposited or assigned and pledged as collateral security hereunder the following:

STOCKS.

156,551 (One hundred and fifty-six thousand five hundred and fifty-one) shares Ohio Copper Company stock.

471,650 (Four hundred and seventy-one thousand six hundred and fifty) shares Stewart Mining Company stock.

4,500 (Four thousand five hundred) shares Alice Gold Mining Company stock.

42,900 (Forty-two thousand nine hundred) shares Western Utah Copper Company stock.

667 (Six hundred and sixty-seven) shares Pittsburgh & New York Coal Company stock.

1,000 (One thousand) shares Basin Reduction Company stock.

9,486 (Nine thousand four hundred and eighty-six) shares Basin and Bay State Mining Company stock.

80,833 (Eighty thousand eight hundred and thirty-three) shares Montana Ore Purchasing Company stock.

2,000 (Two thousand) shares Davis-Daly Copper Company stock.

BONDS.

$ 75,000 (Seventy-five thousand dollars) par value Ohio Copper Company 1st Mortgage 6% Gold Bonds, Sept. 1, 1911. Coupons attached.

638,800 (Six hundred and thirty-eight thousand eight hundred dollars) par value La-France Copper Company 1st Mortgage 6% Gold Bonds, July 1, 1911. Coupons attached.

Equitable Trust Company Receipt, dated November 19, 1909, for

62,000 (Sixty-two thousand dollars) par value Western Ice Company, General and Collateral Mortgage 5% Bonds, January, 1908. Coupons attached, deposited under the "Thomas Liquidation Agreement."

MISCELLANEOUS.

Assignment of account stated between Pittsburgh and New York Coal Company and United Copper Company, amounting to Four hundred and ninety-six thousand five hun-

dred ninety-nine dollars and twenty cents ($496,599.20) on the thirtieth day of June, 1911.

Assignment of contract, dated December 2nd, 1907, between Pittsburgh and New York Coal Company and United Copper Company, including any cause or causes of action which United Copper Company may have against Pittsburgh and New York Coal Company for a breach of said contract.

Assignment by United Copper Company of all its right, title and interest in, to and under a certain contract or agreement between T. B. Shaughnessy and R. B. Angus and F. Augustus Heinze, dated February 10th, 1898, and assigned to United Copper Company by said F. Augustus Heinze on January 10th, 1907.

The above described collateral security has been deposited or assigned and pledged hereunder, not only as security for the payment to any holder or holders hereof of the indebtedness evidenced hereby and any other indebtedness, obligation or obligations of the undersigned owned or acquired by or in the possession of any holder or holders hereof, but also as security for the discharge and satisfaction by the undersigned of any liability of any kind of the undersigned to any holder or holders hereof, whether such indebtedness or liability is now contracted or hereafter contracted, due or to become due, liquidated, contingent or fixed and determined.

The undersigned also hereby confers upon any holder or holders hereof to the amount of all such indebtedness, obligation or obligations, and

to the extent of all of such liability, a lien not only upon the collateral security deposited or assigned and pledged hereunder, but also upon any and all property or securities at any time deposited with or left in the possession or custody of any holder or holders hereof by the undersigned or for account of the undersigned for safekeeping or otherwise, or in which the undersigned has any interest, and also upon any credit balance or deposit account, however arising, which the undersigned may have from time to time with any holder or holders hereof.

In case the indebtedness evidenced hereby and any such other indebtedness, obligation or obligations shall have become due and payable or such liability or liabilities shall have become fixed and determined or shall have been adjusted by judicial proceedings or otherwise, any holder or holders hereof are hereby authorized and empowered at his or their option at any time to appropriate and apply to the payment, extinguishment, discharge or satisfaction thereof any or all moneys now or hereafter in his or their hands or deposit or otherwise to the credit of or belonging to the undersigned; in case of any such indebtedness, obligation or obligations shall not have become due and payable or any such liability or liabilities shall not have become fixed and determined or adjusted, any holder or holders hereof are authorized and empowered to retain, as additional security hereunder, any or all such moneys until such indebtedness obligation or obligations shall have become due and payable or until such liability or liabilities shall have become fixed and determined or adjusted by judicial proceedings or otherwise.

In the event of the filing of a petition in bankruptcy by or against the undersigned, or in the event of application being made for the appointment of a receiver of the undersigned, either by the undersigned or by other parties, all the indebtedness evidenced hereby and all or any of such other indebtedness, obligation or obligations of the undersigned, owned or acquired by or in the possession of any holder or holders hereof shall become and be immediately due and payable without demand of payment thereof and all or any of such liability or liabilities, if then fixed and determined or adjusted, shall similarly become and be immediately due and payable.

Upon failure by the undersigned to comply with any of the provisions herein contained, any holder or holders hereof at his or their option may declare this obligation due, and whether due or not, may sell the whole or any part of the collateral security deposited or assigned and pledged hereunder at any brokers' board or public auction room in the City of New York or in the City of Philadelphia, or at public or private sale, without notice of sale or of the time and place of sale, without demand of payment and without advertisement, unless such holder or holders shall elect to give such notice or notices, or to demand payment or to advertise, which or any of which such holder or holders may omit to do at his or their election; upon any such sale such holder or holders may bid for and become the purchaser or purchasers of the whole or any part of the property sold, and the proceeds of any such sale less the proper costs and expenses thereof shall be applied first to the discharge of this obligation and next to the payment of any other indebtedness, obligation or obligations of

the undersigned, to such holder or holders, whether then due or not due, or to the discharge and satisfaction of any liability or liabilities of the undersigned to such holder or holders, if the same shall have then become fixed and determined or shall have then been adjusted, or such holder or holders may retain the same at their option as additional security against any such indebtedness, obligation or obligations, liability or liabilities, not then matured or fixed and determined or adjusted.

If there by any deficiency, the undersigned promises to pay the same; if any surplus, the amount thereof is to be paid over to the undersigned, subject to the above provisions as to any other indebtedness, obligation or liability.

UNITED COPPER COMPANY,
(Sgd) Chas. W. Saacke, Treasurer.

Exhibit "C".

Petition of Receivers for an Order Authorizing This Motion for Substitution.

IN CHANCERY OF NEW JERSEY.

Between

CALVIN O. GEER, *et als.*,
Complainants,

and

UNITED COPPER COMPANY,
Defendant.

On bill, &c.
Petition.

To the Honorable EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey:

The petition of George D. Hendrickson and Luther Martin, Jr., respectfully shows:

On or about the first day of March, 1917, by an order duly made by your Honor and entered in this Court upon the application of the complainants in the above entitled proceeding, your petitioners were duly appointed Receivers of the United Copper Company, and duly qualified as such, taking the oath required by statute and filing bond as directed in the said order, which bond was duly approved by a Special Master of this Court as provided in said order.

Upon information and belief, your petitioners further show that on or about May 3rd, 1912, an action was duly commenced in the United States District Court for the Southern District of New York, by the United Copper Securities Company and Arthur P. Heinze as plaintiffs, against Amal-

gamated Copper Company, Anaconda Copper Company, Adolph Lewisohn, Frederick Lewisohn, Walter Lewisohn, Albert Lewisohn and Philip S. Henry, as executors and trustees of the Last Will and Testament of Leonard Lewisohn, deceased; Red Metals Company; William Rockefeller, John W. Sterling, Farmers Loan & Trust Company and Henry H. Rogers, as executors and trustees of the Last Will and Testament of Henry H. Rogers, deceased; John D. Ryan, James Stillman and United Copper Company, defendants, as appears by a copy of the summons and complaint on file in the office of the Clerk of said Court, copies of which are herewith submitted.

Said action was brought in behalf of the United Copper Company for damages suffered by it by reason of injury to its business and property flowing from a wrongful conspiracy and combination of the defendants other than the United Copper Company, in restraint of commerce in violation of the Sherman Act, as appears by the said complaint.

The plaintiffs were at the time of the commencement of the Act and still are shareholders of the United Copper Company. Demand was duly made by them upon the United Copper Company to institute the action, but it refused so to do. The United Copper Company was at the time under the control of Lucius A. Dunham, Charles W. Saacke, George Lane, Bernard C. Hughes and John B. Coates, who were not fit and proper persons to conduct the affairs of said corporation in that they disregarded the rights of the shareholders and dissipated and diverted from the assets of the company, as more fully appears by the complaint in the suit in

which your petitioners were appointed as aforesaid.

The United Copper Company defaulted in appearing and answering by reason of its contract by the persons aforesaid.

The defendants appearing in the action demurred to the complaint and brought on their demurrers for argument by motion pursuant to the provisions of the New York Code of Civil Procedure, for judgment on the pleadings and for the dismissal of the complaint upon the ground that the complaint did not state facts sufficient to constitute a course of action and that the action cannot be maintained at law. The said United States District Court sustained the demurrers and dismissed the complaint. The plaintiffs duly sued out a writ of error to the Circuit Court of Appeals for the Second Circuit to review said judgment. The said Circuit Court of Appeals affirmed the judgment of the said District Court. The plaintiffs therefore duly sued out a writ of error to the Supreme Court of the United States to review the said judgment of the Circuit Court of Appeals. Said appeal is now pending in said United States Supreme Court and is No. 208 on the October Term, 1916, Calendar and about to be reached for argument. The following facts appear by the Transcript of Record duly filed in the office of the Clerk of said United States Supreme Court on July 27th, 1915, a copy of which is herewith submitted.

It is apparent from the opinion (Transcript of Record, folio 123) that the precise question decided by the said District Court and the said Circuit Court of Appeals is that said action at law in the sight of the United Copper Company is not maintainable by the shareholders, nominal

plaintiffs of record, to recover for damages suffered by the United Copper Company, for violation of the Sherman Act, by the defendants, and that the dismissal of the complaint was solely upon that ground, and not for insufficiency otherwise to state facts sufficient to constitute a cause of action.

Your petitioners, upon diligent inquiry, are informed and believe that the facts alleged in the complaint are true, and that the United Copper Company is entitled to the damages demanded in the complaint, and that your petitioners, as its receivers, are entitled to recover the same.

Your petitioners are informed by counsel learned in the law, as receivers of the United Copper Company, to be substituted as plaintiffs in the action brought by stockholders in its behalf, who were prosecuting the action in a representative capacity in that the power of amendment to such extent is authorized by Section 9549 of the Revised Statutes of the United States, and as was held by the United States Supreme Court in Bowdler vs. Johnson, 107 U. S., 251, at p. 264, and Gates vs. Goodloe, 101 U. S., 612, at p. 613, and that they are entitled to be heard upon the argument of the appeal now pending before said United States Supreme Court under the authority of Pendleton vs. Russell, 144 U. S., 640, at p. 644 *et seq.*

Your petitioners are ready and willing to enter into bond to the Chancellor, to be approved by a Special Master of this Court, to secure the defendants in said action now pending in the United States Supreme Court for any costs which they may recover against your petitioners, if the action be unsuccessful.

Wherefore your petitioners pray authority to apply in said action in the United States Supreme Court to be substituted for the plaintiffs therein and for other relief as may be proper and to employ counsel to represent them therein; and to employ counsel to represent them and appear and argue the pending appeal in their behalf as such receivers, and in the event of such motion being granted, to prosecute the action, for all of which no previous application has been made.

GEORGE D. HENDRICKSON,
Petitioner.

LUTHER MARTIN, JR.,
Petitioner.

McCARTER & ENGLISH,
Solicitors for and of Counsel with Petitioners.

STATE OF NEW JERSEY, }
County of Hudson, } ss.:

GEORGE D. HENDRICKSON, being duly sworn, deposes and says that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

GEORGE D. HENDRICKSON.

Sworn to before me this 30th }
day of March, 1917. }
ELIZABETH V. SCHENCK,
Notary Public of New Jersey.
(Seal)

STATE OF NEW YORK, }
County of New York, } ss.:

LUTHER MARTIN, JR., being duly sworn, deposes and says that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

LUTHER MARTIN, JR.

Sworn to before me this 30th }
day of March, 1917. }
FREDERICK J. RAHE,
Notary Public of Kings County, #75.
Certificate filed New York County, #138.
(Seal)

Exhibit "D".

Order in Chancery Authorizing Receivers to Make This Motion.

IN CHANCERY OF NEW JERSEY.

Between CALVIN O. GEER, *et al.*, Complainants, and UNITED COPPER COMPANY, Defendant.	On bill, &c. Order

Upon opening this matter to the Court, by Robert H. McCarter, counsel for the complainants, and it appearing by the petition of George D. Hendrickson, Esq., and Mr. Luther Martin, Jr., verified the 30th day of March, 1917, that said petitioners should have authority to apply in the action in the United States Supreme Court, referred to in said petition, to be substituted for the plaintiffs therein and to prosecute the same, as more fully appears by said petition; it is thereupon, on this 2nd day of April, 1917, on motion of Messrs. McCarter & English, solicitors of the complainants, ORDERED that George D. Hendrickson, Esq., and Mr. Luther Martin, Jr., be, and they are hereby authorized to apply in said action in the United States Supreme Court, to be substituted for the plaintiffs therein and for other relief as may be proper and to employ counsel to represent them therein and to employ counsel to represent them and appear and argue the pending appeal in their behalf as such re-

ceivers; and in the event of such motion being granted, to prosecute the action; and to do all other acts which may be necessary for the proper prosecution thereof and which might be done by the United Copper Company.

Application to vacate may be made on ten days' notice.

Respectfully advised,

MERRITT LANE,
V. C.

E. R. WALKER,
C.

Notice is hereby given that the foregoing motion will be presented to the Supreme Court of the United States on Monday, the 9th of April, 1917, at the opening of Court on that day.

Dated, April 4th, 1917.

ROBERT H. MCCARTER,
FERDINAND E. M. BULLOWA,
Counsel for Receivers.

Service of a copy of the foregoing motion and notice is hereby admitted.

....., Attorneys for Defendants.

....., Attorneys for Defendants.

....., Attorneys for Defendants.

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FILED
APR 24 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 208.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE,

Plaintiffs-in-Error,

against

AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, UNITED COPPER COMPANY, *et al.*,

Defendants-in-Error.

BRIEF IN OPPOSITION TO MOTION FOR SUBSTITUTION.

LOUIS MARSHALL,
Counsel for Defendant ADOLPH LEWISOHN.

JOHN A. GARVER,
Counsel for ANACONDA COPPER CO. AND OTHERS.

EDWARD LAUTERBACH,
Counsel for ESTATE OF LEONARD LEWISOHN.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

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ARGUMENT.

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(2) There is nothing in the statutes of New York or of the United States which warrants such a substitution of plaintiffs-in-error, as is now proposed..... 9-13

(3) Not only is the cause of action now sought to be substituted for the plaintiffs' cause of action, which has been determined by the courts, barred by the statute of limitations, but the time within which a writ of error could be taken to this Court, to review the judgment of the Circuit Court of Appeals, has expired, more than a year has

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(4) This application for substitution, made more than two years and a half after the judgment rendered by the District Court, and nearly two years after the rendition of the judgment in the Circuit Court of Appeals, and after the expiration of the terms of court at which such judgments were rendered, necessarily involves the opening of the judgments rendered in favor of the defendants, and is made too late, the terms at which such judgments were rendered having expired 13-14

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Supreme Court of the United States.

UNITED COPPER SECURITIES COMPANY and ARTHUR P. HEINZE, *Plaintiffs-in-Error,* *against* AMALGAMATED COPPER COMPANY, ANACONDA COPPER COMPANY, ADOLPH LEWISOHN, UNITED COPPER COMPANY, *et al.*, *Defendants-in-Error.*	October Term, 1916. No. 208.

Brief in Opposition to Motion for Substitution.

On April 5, 1917, after the interchange of briefs before the argument herein, a motion was noticed, the presentation of which has been postponed until this time, whereby the United Copper Company, by its alleged receivers, George D. Hendrickson and Luther Martin, Jr., asks to be substituted for the plaintiffs in error.

The History of this Action.

This action was commenced on May 3, 1912, in the United States District Court, for the Southern District of New York, by the plaintiffs, who sued individually and on behalf of all the other stockholders of the United Copper Company (*Record, fols. 10, 25*). The defendants demurred to the second amended complaint, on the ground that it did not state facts sufficient to constitute

a cause of action, and upon the further grounds that the plaintiffs' remedy, if any, was in equity (*Record, fols. 76-81*). On August 31, 1914, these demurrers were sustained, and the second amended complaint was dismissed, with costs (*Record, fols. 82-86*). Final judgment was entered dismissing the complaint on September 24, 1914 (*Record, fols. 88-95*).

The original plaintiff's secured a writ of error to the United States Circuit Court of Appeals, where on April 23, 1915, judgment was rendered affirming the judgment of the District Court, with costs (*Record, p. 47*), and on June 24, 1915, a writ of error to this Court was allowed, as prayed for by the plaintiffs in error (*Record, p. 48*).

Our principal briefs indicate the nature of this action and of the questions involved. They show that from the beginning of the litigation the right of the plaintiffs to maintain the action was the sole subject of controversy. It was adjudicated against them by the District Court and the Circuit Court of Appeals, and the case was then brought to this Court by the plaintiffs in error for the express purpose of procuring a determination that they had the right to maintain this action.

The present motion, which is made by one of the counsel who has heretofore represented them, undertakes to eliminate them from the case, and to substitute, as plaintiffs, the United Copper Company or its receivers, although the Copper Company is one of the defendants. The receivers assert that they were appointed on March 1, 1917, in a proceeding instituted against the United Copper Company in the Court of Chancery of New Jersey, by Calvin O. Geer, who ever since this action was brought was an officer of the

United Copper Securities Company, one of the plaintiffs in error, and by Arthur P. Heinze, who is the other of the plaintiffs in error, Ruth Noyes Heinze, his wife, and Ada L. Heinze, his sister-in-law.

The second amended complaint in this action alleges a conspiracy claimed to have been entered into in 1897, in which Leonard Lewisohn, who died on March 5, 1902, and Henry H. Rogers, who died on May 19, 1909, are alleged to have been parties. The acts complained of as having been committed in execution of the conspiracy are stated to have been "in part accomplished in and during the year 1906, and in part in and during the year 1907, and in part in and during the year 1908, and in part in and during the year 1911, and in part up to the time of the making of the demand set forth in paragraph 'IV' hereof", which was alleged to have been in January, 1912 (*Record, fols. 30, 31*).

The specific acts set forth in the complaint are shown to have occurred prior to 1909. In any view of the case, the New York Statute of Limitations has run in favor of the defendants in error with respect to practically the entire, if not every part of the cause of action set forth in the complaint.

The Federal Receivership.

Although the petitioners, Hendrickson and Martin, claim to have been appointed receivers of the United Copper Company by the Court of Chancery of New Jersey on March 1, 1917, they suppressed the fact, shown in the papers filed by the defendants in error in opposition to the motion for substitution, that on February 10, 1913, in an ac-

tion brought in the United States District Court for the Southern District of New York, John S. Shepard, Jr., and Addison E. Cudworth were appointed receivers of the United Copper Company. They failed to show that by the decree appointing them they became vested with "all the properties owned by it" [the United Copper Company] or in which it had any ownership or interest "whether such property be real, personal or mixed and of whatsoever kind and description and wheresoever situated, including * * * things in action, credits, stocks, bonds, securities, shares of stock in the corporations described in the said bill of complaint, and all shares of stock, certificates of equitable interest, and other certificates representing any interest in any property, and all other securities of whatsoever character owned by the defendant company or in which it has any interest or which it controls directly or indirectly."

They also suppressed the fact that the receivers so appointed gave the bonds required by the decree appointing them, that such bonds were approved and filed, and that they qualified as such receivers.

They also failed to show that in ancillary proceedings brought in the United States District Court for the District of New Jersey a decree was rendered on February 13, 1913, appointing John S. Shepard, Jr., Addison E. Cudworth and Frederick L. Johnson, ancillary receivers of the United Copper Company and of all of the properties owned by it, and that such ancillary receivers have duly qualified as such.

In both of these actions the United Copper Company appeared by counsel, answered, admitted the

allegations of the bills of complaint and consented to the relief therein prayed for. The judgment rendered in each of these actions was a final judgment. None of these facts was brought to the attention of the Court of Chancery of New Jersey in the bill of complaint filed there by Geer and Heinzes for the appointment of receivers, although they must have been cognizant of them.

POINTS.

I.

This action, brought and litigated as a stockholder's action, has resulted in a final judgment in favor of the defendants, and cannot be changed in its entire scope and character, by substituting an entirely new plaintiff and a new cause of action, as now proposed, on the eve of the argument of the writ of error sued out by the original plaintiffs, and nearly two years after the rendition of the judgment by the Circuit Court of Appeals.

(1) *New parties cannot be admitted to an action brought here on a writ of error, for the exercise by this Court of its appellate jurisdiction.*

In *United States* v. *Patterson, 15 How. 10*, an effort was made, in a proceeding involving the

title to lands in Louisiana by persons who were not parties to the action, who suggested that a certain deed was not a genuine instrument, to be permitted to intervene here for the purpose of sustaining their rights to the property. The application was denied, Mr. Justice Campbell saying:

"The court is of opinion that the motion cannot be allowed. The plaintiff commenced his proceedings to assert his own claims against the United States. Those proceedings can neither benefit nor injure the persons interested in this motion, for they are not parties to the cause. The period for the assertion of a claim under the act of Congress of 17th June, 1844, has expired. Neither in the District Court nor in this court would it be lawful for persons, who failed to avail themselves of the benefit of that act during its operation, to intervene for the purpose of establishing a right under grants like these, after its expiration, in a suit commenced by other persons."

In *United States* v. *Innerarity*, *19 Wall.*, *595*, a similar petition was dismissed, Mr. Justice Hunt saying:

"The attempt to set up a claim under this petition or a supplemental petition by Innerarity's heirs in favor of the heirs of John Watkins, cannot be sustained. * * * The case is simply this: Innerarity's heirs have filed their petition in time, but have no title. Watkins's heirs have a title, but have not filed a petition for its allowance. Watkins's title cannot be interposed by the present petitioners. Such practice is unknown. If a suit be commenced by A. to recover land or money, he failing on the merits, cannot bring into his suit a new plaintiff, especially one whose action, if then commenced, would be barred by the statute of limitations. If otherwise, the same suit can be con-

tinued indefinitely, constantly making new plaintiffs, until some one shall be found who has a meritorious claim. It would be a practical abrogation of the limitation of the statute. The act of 1867 has been further extended, and the heirs of Watkins must make an original application in their own names. We understand the case of *United States* v. *Patterson, 15 How. 12*, to be a decisive authority against the present claim."

In *New Jersey Franklinite Co.* v. *Ames, 12 N. J. Eq. 507*, a bill to foreclose a mortgage was filed. A second mortgage had been executed by the corporation to trustees to secure the payment of bonds thereafter to be issued. The trustees were made parties defendant. A decree of foreclosure having been granted in the Court of Chancery, an appeal was taken to the Court of Errors and Appeals. When the cause was moved for argument, an application was made to introduce various persons, who claimed to be *cestuis que trust* under the second mortgage, as defendants. It was held that these new parties could not be admitted while the cause was on appeal. Chief Justice Green said:

"This application is made to an appellate tribunal having no original jurisdiction. Its constitutional powers are purely appellate. Its office is simply to review the decrees of the Court of Chancery at the instance of a party aggrieved by the decision of that court, and to decide whether the Chancellor erred or not upon the case before him. And, admitting the power in this court to introduce new parties and new facts, how is the matter to be dealt with? If the applicants' case is presented upon petition and affidavits, are they to be met by counter affidavits to ascertain the truth? And when the facts are ascertained, if the court think that the applicants should be made parties,

how is the bill to be amended, the parties to be brought before us, the pleadings to be filed, and the rights of parties to be settled in this court? How many questions are we to settle that the Chancellor has never heard of in the cause? What will the proceeding be but a bold and lawless usurpation of original jurisdiction?"

In *Hight* v. *Batley*, *32 Wash. 165; s. c., 72 Pac. 1034*, an action was brought by the plaintiff, in his own behalf and in behalf of other citizens and taxpayers of the City of Ballard, and judgment was rendered; from which both parties appealed. They subsequently agreed to withdraw both appeals. Then one Huston and his wife moved for an order either substituting them as plaintiffs and appellants or permitting them to intervene in that capacity, after the case had gone to the Supreme Court of the State. The motion was denied. In the course of its opinion, the Court said:

"It has been held that in a proper case new parties may be substituted in the appellate court. *20 Enc. Pl. & Pr. 1068.* We have examined the cases cited to support the above, and find that they were cases where a transfer of interest in the subject-matter involved had occurred after the trial below, either by actual assignment or by operation of law. The substitution was therefore permitted in behalf of the real party in interest as successor of the original owner. There has, however, been no change of ownership or interest here. These moving parties have acquired no greater interest in the subject-matter involved than they possessed at the time the action was commenced below, and no succession of interest has taken place. The authorities above referred to as being cited to support a substitution in the appellate court 'in a proper case' being wholly unlike this case, we are of the opinion that this is not a proper case for such substitution. * * *

We know of no statutory authority under which a new notice of appeal or a new appeal bond could be entertained by this court at this time. The appeal cannot be prosecuted by these applicants under the former bond given by the plaintiff, since it is conditioned only to pay costs and damages that may be awarded against the plaintiff himself on the appeal."

In *Blatchford* v. *Newberry, 100 Ill. 484*, after the case had been appealed from the Circuit Court of Cook County to the Supreme Court of the State, the Attorney-General, who was not acting for a party to the action, sought to intervene on considerations of public policy. His application was, however, denied, the Court saying:

"The Attorney General asks leave to join in this application, and insists that the public have interests involved in this cause, and he urges a rehearing that he may have an opportunity to assert, support and vindicate the same. We are of opinion that in a cause brought here by appeal, none save such as are parties to the record have a right to be heard. If the interests of the public be such that the Attorney-General may properly intervene in this litigation, we think such intervention must begin in the court of original jurisdiction, and cannot be allowed here."

(2) *There is nothing in the statutes of New York or of the United States which warrants such a substitution of plaintiffs in error, as is now proposed.*

Section 914 of the Revised Statutes provides:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district

courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

Section 723 of the New York Code of Civil Procedure permits the Court "in furtherance of justice, to amend any process, pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defense, by conforming the pleading or other proceedings to the facts proved."

Under this provision, it has been held that it does not justify the striking out of the name of a sole defendant in an action and the insertion in lieu thereof of the names of other persons as defendants.

> *N. Y. State Monitor Milk Pan Assn.* v. *Remington Agricultural Works, 89 N. Y. 22.*
> *Bassett* v. *Fish, 75 N. Y. 303.*
> *Shaw* v. *Cook, 78 N. Y. 194.*

In *Doyle* v. *Carney, 190 N. Y. 386*, the plaintiff, as administrator of the estate of his minor daughter, who died, sued to recover for services rendered by her. It developed on the trial that the services belonged to the father, and an amendment to the complaint conforming to the proof was allowed at the close of the evidence, and a recovery was had. The judgment was reversed, the Court saying:

"If the original plaintiff could not sustain the action, the statute does not authorize an amendment of the pleading which adds the name of a person, who was, as to the original cause of action, a stranger in the eye of the law."

In *Johnson* v. *Phoenix Bridge Co., 197 N. Y. 316*, the plaintiff's decedent, a resident of this State, was killed by the falling of a bridge in Canada. The law of Canada authorized an action for damages in case of death by negligence in case of death by "his consort and his ascendant and descendant relations." The decedent's widow sued as administratrix under the New York statute more than a year after his death, and a motion was made to amend the summons and complaint by striking out the words "as administratrix of the goods, chattels and credits," and inserting therein the names of relatives of the deceased entitled to recover under the Canadian statute. It was decided that, although the action authorized by that statute could be maintained in New York, the summons and complaint could not be amended by bringing into the action the relatives of the deceased as parties, although it could be so amended as to allow the action to be continued by the widow in her individual capacity.

In *North Chicago Street Railway Co.* v. *Burnham, 102 Fed. 669*, it was held by the Circuit Court of Appeals, for the Seventh Circuit, that a State statute, if designed to go so far, "will hardly be followed by the Federal courts to the extent of ordering or permitting after verdict amendments which involve the formation of new issues."

In *Henderson* v. *Louisville, etc., Railway Co., 123 U. S. 64*, it was held that an amendment wholly inconsistent with the allegations of the original petition cannot be allowed.

Section 954 of the United States Revised Statutes deals specifically with the subject of amendments as follows:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

In the present case, there has been a demurrer on the ground that the complaint does not set forth facts sufficient to constitute a cause of action, and on the further ground that the plaintiff's remedy, if any, was in equity. The demurrers have been sustained. It would seem, therefore, to be directly within the prohibition of this section to nullify the sustained demurrers by eliminating the plaintiffs in error, who have been adjudged not to have a cause of action, and substituting entirely different plaintiffs, who would sue on an entirely different theory from that on which the original plaintiffs asserted the right to maintain an action against the defendants.

Furthermore, the objection to the maintenance by the plaintiffs in error of the action instituted by them against the defendants was not one of

form, but of substance. It was that the plaintiffs had no standing in court; that they had no cause of action. The present motion, of necessity, admits the soundness of the contention embodied in the demurrers and of the judgments rendered by the District Court and the Circuit Court of Appeals. To permit the elimination of the plaintiffs in error and the substitution of an entirely different plaintiff, whose cause of action is not dependent upon, but is independent of, that which the original plaintiffs sought to enforce, is to change the nature of the cause, which has been brought here on writ of error, in its entire scope and meaning.

(3) *Not only is the cause of action now sought to be substituted for the plaintiffs' cause of action, which has been determined by the courts, barred by the statute of limitations (Union Pacific Railway Co. v. Wyler, 158 U. S. 296, 297; Atlantic & Pacific Railroad Co. v. Laird, 164 U. S. 395), but the time within which a writ of error could be taken to this Court, to review the judgment of the Circuit Court of Appeals, has expired (26 Stat. at Large, 828, sec. 6; U. S. Fidelity & Guaranty Co. v. Bray, 225 U. S. 205). More than a year has elapsed since the entry of the judgment sought to be reviewed.*

(4) *This application for substitution, made more than two years and a half after the judgment rendered by the District Court, and nearly two years after the rendition of the judgment in the Circuit Court of Appeals, and after the expiration of the terms of court at which such judgments were rendered, necessarily involves the opening of the judgments rendered in favor of the*

defendants, and is made too late, the terms at which such judgments were rendered having expired.

Brooks v. *Railroad, 102 U. S. 107.*
Bronson v. *Schulten, 104 U. S. 410.*
Phillips v. *Negley, 117 U. S. 665.*
Hardman v. *Fort Scott, 141 U. S. 415.*
Wetmore v. *Karrick, 205 U. S. 151-157.*

(5) *The decisions cited in the petition of the receivers, in its support, are not applicable here.*

Gates v. *Goodloe, 101 U. S. 612,* came here on error from the Supreme Court of Tennessee. The original decree in the Chancery Court of that State was rendered against S. M. Gates, A. M. Wood and Milton McKnight, partners, and was affirmed in substance by the Supreme Court of the State on October 13, 1875. On August 1, 1876, Gates and Wood received discharges in bankruptcy, which released them individually from all provable debts existing against them on April 22, 1876, other than those excepted from the operation of the discharge. A writ of error to this Court was sued out on October 30, 1876, by all the partners. The defendant therein moved for a dismissal, on the assumption that the assignee in bankruptcy could alone prosecute it. It was decided that the assignee had the right, because of the devolution to him of the title of the bankrupts' property, to prosecute the writ, so far as it concerned those whom he represented, and that if the bankrupts could not themselves sue it out after their discharge, as to which no opinion was expressed, the difficulty in that respect had been removed by the application of the assignee for an order substituting him as plaintiff in error.

In that case, the assignee was a direct successor in title of the bankrupts, just as their executor or administrator would have been had they died. He was not a new party. He did not represent a new cause of action, nor had there been any adjudication which declared that the bankrupts had no standing in court and had no cause of action to maintain, as is the case here.

Moreover, in the case cited, it was intimated that, independently of the facts just considered, McKnight, the partner against whom no bankruptcy had been instituted, might have sued out the writ of error, using for that purpose, if necessary, the names of all the parties against whom the original decree was rendered. Hence, with both the assignee in bankruptcy and McKnight before the court, there was no reason why the cause should not have proceeded here to a final determination upon the errors assigned.

Bowden v. *Johnson, 107 U. S. 251*, was a case brought by a receiver of a national bank, in equity, against alleged stockholders of the bank, to charge them with liability as stockholders. A decree was rendered dismissing the bill after a new receiver had been appointed. An appeal to this court was taken in the name of the old receiver, as complainant, the new receiver becoming a surety on the appeal bond. The new receiver was, on his own motion, substituted as complainant and appellant, without prejudice to the proceedings already had. There the new receiver was the successor in interest of the old. Both acted in the same representative capacity. There was no new causes of action, and no new interest was interjected into the existing litigation. There was a mere devolution of title from

one receiver to the other, and not a revolution in respect to the status of the plaintiff and of the cause of action sought to be enforced by the substituted plaintiff and appellant, as is the case here.

Pendleton v. *Russell*, *144 U. S. 640*, was an action brought by the children of an insured against the insurance company, to recover the amount of a policy. The claimants recovered a judgment. A writ of error to this court was sued out by the company, and a supersedeas bond was given. While the cause was pending in this court, an action was brought by the Attorney-General of New York to dissolve the insurance company, and a judgment to that effect was rendered and a receiver appointed. The receiver, ascertaining the pendency of the cause in this court, obtained authority to employ counsel to argue the cause here, and judgment was rendered reversing the judgment of the Circuit Court and awarding a new trial. The receiver was not substituted as a party to the action, nor was he served with any process, and subsequently the claimants took judgment by default against the insurance company in the Circuit Court. On filing their claim with the receiver, he rejected it, but, a reference having been ordered, the proceedings resulted in a decision by the Court of Appeals disallowing the claim.

On writ of error to this court, it was held that the appearance of the receiver in this court, for the purpose of securing a reversal of the original judgment, gave to the Circuit Court of Tennessee no jurisdiction over the case, after the dissolution of the corporation, which could bind the property of the company in the hands of the receiver.

It is difficult to understand on what theory that case can be regarded as in any way parallel with

the present. Even if the receiver had been substituted as a party, it would have been because of the devolution upon him of the rights and duties of the corporation. In the present case, the corporation was an actual party defendant to the litigation, and the attempt is made to substitute the receivers for the individual plaintiffs, who were merely stockholders of the corporation, and who, as such, were adjudged to have no cause of action.

II.

The petitioners are not vested with any cause of action existing in favor of the United Copper Company, since John S. Shepard, Jr., and Addison E. Cudworth had been previously appointed receivers of the corporation by the United States District Court of New York and they, together with Frederick L. Johnson, had been appointed as ancillary receivers by the United States District Court of New Jersey, and qualified as such.

"When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom

the court shall ultimately adjudge to be entitled to it."

Wiswall v. *Sampson*, *14 How. 52, 65.*
Peale v. *Phipps*, *14 How. 368, 374.*
Booth v. *Clark*, *17 How. 322, 331.*
Union Bank v. *Kansas City Bank*, *136 U. S. 223.*
Thompson v. *Phenix Ins. Co.*, *136 U. S. 287, 297.*
In re Tyler, *149 U. S. 164, 181.*
Porter v. *Sabin*, *149 U. S. 479.*

"Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. * * * Those principles are of general application and not peculiar to the relations of the courts of the United States to the courts of the States; they are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons and controversies; they are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice."

Wabash Railroad Co. v. *Adelbert College*, *208 U. S. 54.*
Palmer v. *Texas*, *212 U. S. 125.*

"The possession of the *res* vests the court which has first acquired jurisdiction with the power to

hear and determine all controversies relating thereto, and for the time being disables other courts of coordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction em braces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected."

Farmers' L. & T. Co. v. *Lake Street R. R. Co., 177 U. S. 51, 61.*
Peck v. *Jenness, 7 How. 612.*
Freeman v. *Howe, 24 How. 450.*
Moran v. *Sturges, 154 U. S. 256.*
Central Bank v. *Stevens, 169 U. S. 432.*

These principles have been frequently applied in the case of receiverships.

Shields v. *Coleman, 157 U. S. 168.*
In re Chetwood, 165 U. S. 443.

III.

The substitution of the petitioners as plaintiffs would, under the circumstances of this case, be inequitable.

The plaintiffs in error are so closely identified with the complainants in the suit brought in the Court of Chancery of New Jersey, which resulted in the appointment of the petitioners as receivers of the United Copper Company, as to render the latter proceedings suspicious. The complainants in that suit are practically identical with the plaintiffs in error here. Geer was the President of the United Copper Securities Company. Arthur P. Heinze, one of the complainants, is also one of the plaintiffs in error; Ruth Noyes Heinze and Ada L. Heinze are respectively his wife and sister-in-law. Arthur P. Heinze was also one of the organizers of the United Copper Company, at one time its Vice-President, and one of its Directors until 1908. He does not plead ignorance as to the fortunes of that Company. His affidavit annexed to the bill of complaint in the Chancery suit indicates his complete familiarity with them.

In the second amended complaint in this action, which is verified by Heinze, he alleges that the plaintiffs in error deliberately sued in their own names individually and on behalf of all other stockholders of the United Copper Company. Although demurrers were interposed as to their right to maintain this action, they persisted in litigating in their own names, not only after a judgment sustaining the demurrer was rendered by the United States District Court, but after the affirmance of that judgment by the United States

Circuit Court of Appeals. It was not until after the briefs were filed in this Court in advance of the argument that they hastened to procure the appointment of a receiver, the bill of complaint being verified on February 28, 1917, and the receivers, who are represented on the present motion by the same attorney who has acted for the plaintiffs in error throughout this litigation, have in their petition made no reference whatsoever to the prior receivership, but have studiously suppressed that fact. That is, to say the least, disingenuous.

IV.

It is respectfully submitted that the motion for substitution should be denied.

LOUIS MARSHALL,
Counsel for Defendant Adolph Lewisohn.

JOHN A. GARVER,
Counsel for Anaconda Copper Co. and others.

EDWARD LAUTERBACH,
Counsel for Estate of Leonard Lewisohn.

UNITED COPPER SECURITIES COMPANY ET AL. *v.* AMALGAMATED COPPER COMPANY ET AL.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 208. Argued April 24, 1917.—Decided May 21, 1917.

The established principles limiting the right of a stockholder to sue on behalf of the corporation when it refuses to do so, restated and held applicable to an action for damages based on alleged injury to the corporation through violations of the Sherman Act.

The rule which confines the individual stockholder to the equitable forum when seeking to enforce a right of the corporation applies when the cause of action arises under the Sherman Act, as in other cases. *Fleitmann* v. *Welsbach Co.*, 240 U. S. 27, distinguished.

Whether or not in an action by stockholders to enforce an alleged right of their corporation this court has power to substitute as plaintiffs persons appointed receivers of the corporation while the writ of error is pending, *Held* that in the circumstances stated in the opinion such a motion was without merit in this case.

223 Fed. Rep. 421, affirmed.

THE case is stated in the opinion.

Mr. Ferdinand E. M. Bullowa, with whom *Mr. Ralph James M. Bullowa*, *Mr. Emilie M. Bullowa* and *Mr. Robert H. McCarter* were on the briefs, for plaintiffs in error.

Mr. John A. Garver for defendants in error Amalgamated Copper Company *et al.*

Mr. Louis Marshall for defendant in error Adolph Lewisohn.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This is an action at law. The complaint alleges that plaintiffs are the holders of more than 200 of the 500,000 shares of the outstanding stock of the defendant United Copper Company, a New Jersey corporation; that the defendants other than that company have by conduct violating the Sherman Law (Act of July 2, 1890, c. 647, 26 Stat. 209) injured it to the extent of more than $5,000,000,[1] and that:

"IV. In or about the month of January, 1912, and before the commencement of this action the plaintiffs, United Copper Securities Company and Arthur P. Heinze, each made a demand upon the defendant, United Copper Company, that this or a like action be instituted by said corporation defendant, and said corporation defendant, and its Board of Directors, have refused to comply with said demand, and have failed and refused to commence or cause to be commenced any action whatever in compliance therewith.

"V. This action is commenced and prosecuted by the

[1] The bill is framed on the theory that the injury to the United Copper Company was suffered directly, as a competitor of the other defendants, and the case will be discussed on that supposition. It is proper to observe, however, that the allegations of the bill are ambiguous in this respect, and that the United Copper Company appears to have been a mere holding company, which suffered injury only indirectly as controlling stockholder in various mining companies alleged to have been damaged by the conspiracy and which were not made parties to this suit.

plaintiff United Copper Securities Company, and by the plaintiff, Arthur P. Heinze, each individually and for himself and also on his own behalf and on behalf of all the other stockholders of said United Copper Company."

The complaint concludes:

"Wherefore, the plaintiffs demand judgment in their favor and in favor of any stockholders of the United Copper Company who may join with them in the prosecution of this action in the sum of three-fold damages under Section 7 of the Act of Congress aforesaid, and that each of the defendants shall be compelled to pay the damages sustained by the United Copper Company, as hereinbefore alleged."

The District Court sustained a demurrer and dismissed the complaint. Its judgment was affirmed by the Circuit Court of Appeals, 223 Fed. Rep. 421; and the case comes here on writ of error. A motion for substitution of plaintiffs, hereafter referred to, was made in this court and argued with the merits.

There is no statement in the complaint that the alleged wrongful acts have caused injury to the plaintiffs as individual shareholders; and no recovery is sought for damages to them or to their property. The case involves, therefore, this single question: Whether a stockholder in a corporation which is alleged to have a cause of action in damages against others for conduct in violation of the Sherman Act, may sue at law to recover such damages in the right of the corporation, if, after request, it refuses to institute the suit itself? Insuperable obstacles to the maintenance of the action are presented both by the substantive law and by the law of procedure.

Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders. Courts inter-

fere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment; and, as a rule, only after application to the stockholders, unless it appears that there was no opportunity for such application, that such application would be futile (as where the wrongdoers control the corporation), or that the delay involved would defeat recovery.[1] In the instant case there is no allegation that the United Copper Company is in the control of the alleged wrongdoers or that its directors stand in any relations to them or that they have been guilty of any misconduct whatsoever. Nor is there even an allegation that their action in refusing to bring such suit is unwise. No application appears to have been made to the stockholders as a body or indeed to any other stockholders individually; nor does it appear that there was no opportunity to make it, and no special facts are shown which render such application unnecessary. For aught that appears, the course pursued by the directors has the approval of all the stockholders except the plaintiffs. The fact that the cause of action is based on the Sherman Law does not limit the discretion of the directors or the power of the body of stockholders; nor does it give to individual shareholders the right to interfere with the internal management of the corporation.

But even if the circumstances were such as to justify individual stockholders in seeking the aid of the court to enforce rights of the corporation, it is clear that their remedy is not at law.[2] The particular equitable relief

[1] *Hawes* v. *Oakland*, 104 U. S. 450; *Quincy* v. *Steel*, 120 U. S. 241; *Corbus* v. *Alaska Treadwell Gold Mining Co.*, 187 U. S. 455; *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.*, 213 U. S. 435. See *Macon, D. & S. R. Co.* v. *Shailer*, 141 Fed. Rep. 585.

[2] *Hawes* v. *Oakland*, 104 U. S. 450, 454; *Quincy* v. *Steel*, 120 U. S. 241. The latter case was an equity suit by a stockholder to enforce a purely

sought in *Fleitmann* v. *Welsbach Co.*, 240 U. S. 27, was denied; but this denial affords no reason for assuming that the long settled rule under which stockholders may seek such relief only in a court of equity will be departed from because the cause of action involved arises under the Sherman Law.

This action was commenced May 3, 1912. The judgment dismissing the complaint was rendered in the District Court September 24, 1914, and affirmed by the Circuit Court of Appeals April 13, 1915. The case was entered in this court July 27, 1915. On April 7, 1917, about a fortnight before the case was reached for argument, George D. Hendrickson and Luther Martin, Jr., filed in this court a motion that they be substituted as plaintiffs in error. The motion recites that they had, on March 1, 1917, been appointed receivers of the United Copper Company by the Court of Chancery of New Jersey, and had on April 2, 1917, been authorized by it to apply for such substitution. Annexed to the motion is a copy of the petition for appointment of the receivers which alleges that the United Copper Company had on February 28, 1912, been dissolved by proclamation of the Governor of New Jersey for failure to pay franchise taxes; and that it had assets of large value; but that its directors named (who under the statute thereupon became trustees for the corporation) had taken no steps whatever to collect its assets or settle its affairs and were not fit and proper persons to be entrusted with them. Only by opposing affidavits filed by defendants was it disclosed that, on February 10, 1913, more than four years previously, the District Court of the United States for the Southern District of New York had appointed others receivers of the

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legal claim of the corporation—damages for breach of contract; and the court sustained a demurrer to the bill, not because the suit should have been at law, but because the bill failed to show that complainant had made sufficient effort to induce the directors to enter suit.

United Copper Company, and had vested in those receivers the possession of "all the properties owned by the defendant [the United Copper Company], or in which the said defendant has any ownership or interest, whether such property be real, personal or mixed, of whatsoever kind and description, and wheresoever situated, including . . . things in action, credits, stocks, bonds, securities, shares of stock in the corporations described in said bill of complaint, and all shares of stock, certificates of equitable interest and other certificates representing any interest in any property and all other securities of whatsoever character owned by the defendant company, on or in which it has any interest, or which it controls directly or indirectly," and that on February 14, 1913, the same persons had been appointed ancillary receivers by the United States District Court for the District of New Jersey. We have no occasion to consider the power of this court to grant the motion for substitution. See *Railway Co.* v. *Twombly*, 100 U. S. 78, 81. It is without merit and is denied.

Judgment affirmed.